OCTOBER TERM, [redacted] 1919

No. [redacted] 243

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS.

No. [redacted] 244

THE OMAHA TRIBE OF INDIANS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 737.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS.

No. 738.

THE OMAHA TRIBE OF INDIANS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

In the Court of Claims.

THE OMAHA TRIBE OF INDIANS, Petitioner,
against
THE UNITED STATES OF AMERICA, Defendant. } No. 31002.

I. Petition. Filed June 19, 1911.

To the honorable Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Omaha Tribe of Indians, respectfully represents:

I.

That it is a tribe of Indians, formerly in treaty relations with the United States, and then and now under the control and guardianship of the United States. That said tribe of Indians is resident in the eastern part of the State of Nebraska, and brings this suit by virtue of and pursuant to an act of Congress, approved June 22, 1910, said act, so far as pertinent or material to the claims of your petitioner herewith presented being as follows:

"That all claims of whatsoever nature which the Omaha
2 Tribe of Indians may have or claim to have against the United States may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under the treaty between the United States and the said tribe of Indians, ratified and affirmed March 16, 1854, or under any other treaties or laws, or for misappropriation of any funds of said tribe not for its material benefit, or for failure of the United States to pay said tribe any money due; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all legal and equitable claims, if any, of said Omaha Tribe of Indians against the United States, and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said tribe, and to enter judgment thereon. The Court of Claims shall advance said cause upon the docket and shall have authority to settle the rights, both legal and equitable, of both the Omaha Tribe of Indians and the United States, notwithstanding lapse of time or statutes of limitation, and the final judgment and satisfaction thereof shall be a full settlement of all claims of said Omaha Indians against the United States."

II.

That in and by a treaty duly concluded and ratified between the United States of America and the Omaha Tribe of Indians, said treaty being of date March 16, 1854, ratified April 17, 1854, by the Senate of

the United States, and proclaimed June 21, 1854, by the President of the United States (10 Stats., 1043; 2 Kappler's Indian Laws and Treaties, 611), the Omaha Tribe of Indians ceded a large
3 part of the lands recognized by the United States of America to belong to said tribe of Indians to the United States, but with a provision whereby in the event the Omaha Tribe of Indians should elect not to have reserved to them and to occupy as their future home the lands of the Omaha Tribe west of the Missouri River and north of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs to the western boundary of the Omaha country, the lands of the Omahas west of the Missouri River and south of said division line being ceded to the United States, that said Omaha Tribe of Indians should have a right to have reserved to it and to occupy as its future home a certain tract of land of not to exceed three hundred thousand acres, situated south of the north boundary line of the tract of country it, the Omaha Tribe of Indians, ceded to the United States, and that said Omaha Tribe of Indians, if they elected after examination of the same, not to accept and not to have reserved and not to occupy as their future home the lands north of the aforesaid division line, should be paid for the lands north of said aforesaid line at the same rate per acre as for the lands south of said division line after making due allowance for the three hundred thousand acres assigned south of the aforesaid division line. That the lands north of the said aforesaid line drawn due west of the Missouri River from the latitude where the Ayoway River disembogues out of the bluffs comprised largely in excess of three hundred thousand acres, said lands, in fact, comprising about eight hundred thousand acres, more or less. That the Omaha Tribe of Indians upon examination of the lands north of the said described line decided that the same did not
4 constitute and comprise a residence suited for and acceptable to them, the Omaha Tribe of Indians, and said fact was reported to the President of the United States, whereupon, pursuant to the aforesaid treaty of March 16, 1854, there was reserved and set apart a new location south of said line of approximately three hundred thousand acres as the future home of your petitioner, the Omaha Tribe of Indians, and upon which tract of land of three hundred thousand acres so set apart for them south of said line, less such lands as have been since sold pursuant to statutes in such cases made and provided, the Omaha Tribe of Indians are now located, and have had their home since the aforesaid treaty of March 16, 1854. That the United States did not pay, and never has paid or tendered to the Omaha Tribe of Indians, payment for the lands north of said described line in article 1 of the treaty of 1854, but without payment to the Omaha Tribe of Indians therefor, and without any lawful warrant therefor, and without obtaining a release or conveyance of the Omaha Tribe thereto, proceeded to, and did, sell the lands

north of said line as the property or public domain of it, the United States of America, under the preemption laws of the United States, and received therefor a sum of not less than one dollar and twenty-five cents per acre for each and every acre of land sold in the tract of country north of the line described in article 1 of the treaty of 1854, aforesaid, the same being less than the true value thereof, and the proceeds of said sales were covered into the Treasury of the United States to the credit of said United States. That in the matter of said lands and sales thereof the United States was the trustee of your petitioner, the Omaha Tribe of Indians, and was, and is, liable to, and should account in law and equity to your petitioner,
5 the Omaha Tribe of Indians, for the entire amount it received for the lands north of said described line in article 1 of the treaty of 1854, less the amount received for three hundred thousand acres of said land, which said three hundred thousand acres belonged to the United States of America in lieu of the three hundred thousand acres of land assigned to your petitioner, the Omaha Tribe of Indians, south of the described division line aforesaid and to account to petitioner in the sum of one dollar and twenty-five cents per acre for such lands, if any, as the United States may have undertaken to dispose of for considerations other than money. That your petitioner is informed and believes that the amount of land in excess of said three hundred thousand acres north of the aforesaid described line is about five hundred thousand acres, more or less, and that the United States for said five hundred thousand acres, more or less, received a sum of not less than one dollar and twenty-five cents per acre, for which it should account to the Omaha Tribe of Indians, there being justly due, as claimed by your petitioner, to the Omaha Tribe of Indians on account of the matters and things aforesaid on a true and just accounting a sum of money amounting to not less than six hundred and twenty-five thousand dollars, and your petitioner, the Omaha Tribe of Indians, claims said sum of six hundred and twenty-five thousand dollars on account of the matters and things aforesaid, together with such further sum or sums, if any, as on a true and just accounting between your petitioner, the Omaha Tribe of Indians, and its trustee in such matter, the United States of America, it may be found the United States received for said lands north of the described line aforesaid after making due allowance to the United States of America for the
6 three hundred thousand acres north of said line to which it was entitled in lieu of the three hundred thousand acres assigned to your petitioner, the Omaha Tribe of Indians, south of the described division line aforesaid, your petitioner, the Omaha Tribe of Indians, further claiming interest at the rate of five per cent per annum on said sum or sums from the date of receipt thereof by the United States.

That the matters and things hereinbefore recited, and the line of division referred to between the lands north and south of said line

are fully set forth in article 1 of the aforesaid treaty executed March 16, 1854, said article 1 providing as follows:

"ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquishes all right and title to the country south of said line: Provided, however, That if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in council express themselves satisfied, then it shall be deemed
7 and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

That your petitioner, the Omaha Tribe of Indians, did comply with each and every provision of article 1 of the treaty of March 16, 1854, aforesaid, and with each and every other provision of said treaty of March 16, 1854, aforesaid, but the United States of America, as hereinbefore set forth, did not comply with its stipulation and agreement to pay your petitioner, the Omaha Tribe of Indians, for the lands north of the hereinbefore-described line, but undertook to and did dispose of said lands to settlers and citizens of the United States of America without reference to the title thereto of your petitioner, the Omaha Tribe of Indians, and thereby became liable on an accounting to your petitioner as trustee with reference to said lands in and for your petitioner, the Omaha Tribe of Indians.

III.

That in and by the terms of the aforesaid treaty of March 16, 1854, provision was made for the execution of the cessions of land
8 made by your petitioner, the Omaha Tribe of Indians, by article 1 of said treaty, and it was stipulated and agreed between the parties thereto that in consideration that the Omaha Tribe of In-

dians would remove within the period of one year from the date of ratification and proclamation of said treaty of March 16, 1854, that the United States would pay out and and expend for the benefit of the Omaha Tribe of Indians in their removal from the tract of land ceded by them as aforesaid to their new home the sum of forty-one thousand dollars in addition to the money agreed to be paid to the Omaha Tribe of Indians as consideration for the cessions of land agreed to be made by them by said treaty, and in addition would fence and break up two hundred acres of land for your petitioner, the Omaha Tribe of Indians, at their new home. That the defendant, the United States of America, did not, as matter of fact, expend the sum of forty-one thousand dollars as stipulated and agreed should be paid out and expended in and about the removal of your petitioner, the Omaha Tribe of Indians, from the tract of land ceded as aforesaid to their new home, and their subsistence for one year at their new home, together with the cost of exploration of the lands north of the division line aforesaid, and did not fence and break up two hundred acres of land at their new home for the benefit of your petitioner, the Omaha Tribe of Indians, as agreed to, but on the contrary your petitioner, the Omaha Tribe of Indians, was compelled at its own cost and expense and at serious injury to the life and health and comfort and convenience of your petitioner, the Omaha Tribe of Indians, and especially the aged and infirm members of said tribe of Indians, to remove themselves without aid or assistance from the United States of America in and about the matter of said removal
9 from the ceded tract of land to their new home, and was compelled to subsist its own members, the Omaha Tribe of Indians, for one year at their new home without the agreed aid from the United States, and said United States further broke out and fenced for said Omaha Tribe of Indians at their new home a tract of land of not to exceed forty acres in the place and stead of two hundred acres of land which it agreed should be fenced and broken up for your petitioner, the Omaha Tribe of Indians, at their new home, whereby, and by reason whereof, your petitioner, the Omaha Tribe of Indians, claims that the defendant, the United States of America, is liable to and should account to your petitioner, the Omaha Tribe of Indians, for the sum of forty-two thousand dollars, more or less, together with interest on said sum from the 22d day of June, 1854, until paid.

That the provisions of the aforesaid treaty of March 16, 1854, which, it is claimed by your petitioner, the Omaha Tribe of Indians, were violated by the defendant, the United States of America, in the matter of the removal and subsistence of your petitioner, the Omaha Tribe of Indians, from the lands ceded by article 1 of the aforesaid treaty of March 16, 1854, to their new home, are as follows:

"ARTICLE 2. The Omahas agree, that as soon after the United States shall make the necessary provisions for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the

ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be.

* * * * * * *

10 "ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve."

That your petitioner, the Omaha Tribe of Indians, did, as hereinbefore stated, comply with each and every provision of said articles 2 and 5, and each and every other article and provision of said treaty of March 16, 1854, but the United States, as herein set forth, did not comply with its stipulations and agreements as contained in said articles 2 and 5 of the aforesaid treaty of March 16, 1854, and under the terms of the jurisdictional act of June 22, 1910, is liable to account to your petitioner, the Omaha Tribe of Indians, therefor, at law and in equity, and your petitioner claims on said account the sum of forty-two thousand dollars, with interest thereon at the rate of five per cent per annum from the 22d day of June, 1854, until paid.

IV.

That the petitioner, the Omaha Tribe of Indians, has a just claim against the United States for the loss of life, limb, and liberty of members of said tribe, and of property of members of said
11 tribe of Indians, at the hands of the Sioux and other hostile tribes of Indians, protection from whom was guaranteed to the petitioners, the Omaha Tribe of Indians, by the United States by the terms of the aforesaid treaty of March 16, 1854, and the stipulations and agreements of which treaty the petitioner, the Omaha Tribe of Indians, complied with, but with the provisions of which treaty the United States failed to comply in that it failed to afford the protection to the petitioner, the Omaha Tribe of Indians, which it had guaranteed. That by article 7 of the aforesaid treaty of March 16, 1854, it was covenanted and agreed between the parties hereto, as follows:

"Article 7. Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed."

That said article in said treaty was entered into by virtue and by reason of the fact that it was represented by the petitioner, the Omaha Tribe of Indians, to the United States that said tribe of Indians was situated on the frontier between settlers on the outlying boundaries of the occupied portions of territory of the United States and warlike and hostile tribes of Indians, and that should the petitioner, the Omaha Tribe of Indians, enter into treaty engagements with the United States and endeavor, as said treaty contemplated, to adapt itself to the civilized mode of life of white citizens of the United States, that it would occasion resentment against peti-
12 tioner on the part of the Sioux and other hostile tribes of Indians, and that reprisals would be necessary on the part of the petitioner, the Omaha Tribe of Indians, to protect the petitioner from said hostile tribes of Indians. That thereupon it was stipulated and agreed between the parties hereto that the petitioner, the Omaha Tribe of Indians, should refrain from hostilities, should place its protection under the direction of the United States and that the United States would guarantee to and would protect the petitioner in petitioner's efforts to adapt itself to a civilized and peaceful mode of life. That the petitioner, the Omaha Tribe of Indians, did endeavor to adopt a peaceful and civilized mode of life, and as a consequence thereof did incur the hostility of the Sioux and other hostile tribes of Indians situated near them. That said Sioux and other hostile tribes of Indians made assaults upon the person and property of the petitioner, the Omaha Tribe of Indians, and the petitioner appealed to the United States for the protection guaranteed by the United States, but no adequate and sufficient steps were taken by the United States under its guarantee, as aforesaid, and in consequence of the failure on the part of the United States to keep its guarantee contained in article 7 of the aforesaid treaty of March 16, 1854, the petitioner, the Omaha Tribe of Indians, from the date of the making of said treaty of 1854, suffered the loss of a large number of members of its tribe at the hands of hostile tribes of Indians, said total number of Indians whose lives were lost as aforesaid being about fifty. That a smaller number, estimated at about forty members of the Omaha Tribe of Indians, were wounded or taken prisoners by the Sioux and other hostile tribes of Indians, and property of the *of the* Omaha Tribe of Indians to a value in excess of the sum of one
13 hundred thousand dollars was lost to the Omaha Tribe of Indians, petitioner hereto, by the depredations of the Sioux and other hostile tribes of Indians subsequent to the aforesaid treaty of March 16, 1854, and in large part in consequence of the execution of said treaty and a faithful observance of its stipulations by petitioner, the Omaha Tribe of Indians. That complaint repeatedly was made, and the failure of the United States to afford the protection guaranteed was repeatedly called to the attention of the agents, officers, and servants of the United States, and the same was called to the attention of the chief executive authorities of the United

States, but while it was admitted that protection was necessary and should be afforded to the petitioner, the Omaha Tribe of Indians by the United States, the same was not afforded as covenanted by article 7 aforesaid.

That the names of some of the Omaha Indians who were killed by hostile tribes of Indians subsequent to the making of the aforesaid treaty of March 16, 1854, were as follows: Mununkaka and wife, Mushkaaca, Binzategra, Tahagaca, Agahamone, Othacaa, Zhanshada, Red Shield, Logan Fontenelle, Zeleke, Semekase, Nunkanah, Wanuzaba, Hundunmoni, Monchoo-wanuca, Hashathaga's wife, Munshukane's wife, Tanuzhis's wife, Big Turtle's wife, Monchowanca's mother, Hacagaska, Mucawatha's mother.

That the names of others who were taken prisoners of war by hostile tribes of Indians were as follows: Ebagemba's wife and Nathaniel Burt.

That the names of others who were wounded or scalped were as follows: Hacago, badly wounded; Schedoba, Hashathaga; one woman, name unknown, scalped; Gachezheethu-Charles Robinson; Hu-
14 muthiszhinga; Waxiga; Keshtawgo; Wasogetha; Ithecoda; Tabeah's wife; Metace; Mucpemoni and Meahconda.

That besides those whose names are given herein, other members of the Omaha Tribe of Indians whose names petitioner is not able at this time to set forth, were killed or wounded to a total number of about fifty Indians killed, more or less, and about forty Indians wounded, more or less.

That the property stolen or captured by hostile tribes of Indians included about one thousand horses of the Omaha Tribe of Indians, more or less, and many of which horses were not ponies, but of a superior breed.

That at the time of the execution of the aforesaid treaty of March 16, 1854, there had been a regulation proposed by the United States, defendant hereto, and agreements had been entered into by Indian tribes in Nebraska where was the home of petitioner, fixing the sum of one thousand dollars as the price to be paid by one tribe of Indians to another tribe of Indians for members of the tribe who might be killed by members of the other tribe of Indians, and said amount, it was understood and agreed between representatives of petitioner, the Omaha Tribe of Indians, and the officials of the Government of the United States, should be the measure of damages suffered by petitioner, the Omaha Tribe of Indians, for and in consequence of the loss of life, limb, and liberty on the part of the petitioner, the Omaha Tribe of Indians, through observance by it, the petitioner, of its agreement with the United States in and by the treaty aforesaid of March 16, 1854, not to continue warlike operations against the Sioux and other hostile tribes of Indians, but to rely for protection upon the guarantee of the United States.

15 Wherefore, the petitioner claims that the United States of America, defendant hereto, has violated the terms of its treaties with the petitioner, the Omaha Tribe of Indians, to the dam-

age of the Omaha Tribe of Indians in the sum of fifty thousand dollars for loss of life of members of the Omaha Tribe of Indians; of forty thousand dollars for loss of limb or body by petitioner, the Omaha Tribe of Indians; and the sum of one hundred thousand dollars for loss of property by the petitioner, the Omaha Tride of Indians, at the hands of the Sioux and other hostile tribes of Indians, the whole of said claim of this paragraph of the claims of petitioner, the Omaha Tribe of Indians, aggregating the sum of one hundred and ninety thousand dollars on a true and just accounting between the petitioner or claimant herein, the Omaha Tribe of Indians, and the defendant, the United States of America.

V.

That petitioner, the Omaha Tribe of Indians, has a just claim against the United States of America in the sum of fifty thousand dollars for timber on the lands of the petitioner, the Omaha Tribe of Indians, destroyed by settlers, citizens of the United States of America. That it became and was the duty of the United States of America subsequent to the execution of the aforesaid treaty of March 16, 1854, to protect the Omaha Tribe of Indians and the timber belonging to said tribe upon the reservation of three hundred thousand acres of land guaranteed to them as a new home by the aforesaid treaty of March 16, 1854, against spoliation, but the United States of America, in violation of the terms and provisions of said
16 treaty, permitted petitioner, the Omaha Tribe of Indians, to be spoliated of valuable oak, walnut and other timbers upon its aforesaid reservation of three hundred thousand acres to an amount aggregating in value fifty thousand dollars. Wherefore, the petitioner, the Omaha Tribe of Indians, sues the United States of America and claims the sum of fifty thousand dollars on account of timber of petitioner destroyed by citizens of the United States of America in violation of the terms of treaty stipulations between the parties hereto and the obligations and duties of the United States as trustee and guardian of your petitioner.

VI.

That the petitioner, the Omaha Tribe of Indians, claims the sum of thirty thousand dollars from the defendant hereto, with interest on the same from January 1, 1857, to date, at the rate of five per cent per annum, on account of funds of petitioner, the Omaha Tribe of Indians, misappropriated in the year 1856 by an agent of the United States, which said funds in the sum of approximately thirty thousand dollars were not used for purposes for the material benefit of petitioner, the Omaha Tribe of Indians, and were not paid by the United States to the Omaha Tribe of Indians, though due, but were misappropriated by an agent of the United States to his own personal use in or about the year 1856, and recompense therefor never made by defendant, the United States of America, to petitioner. Where-

fore, petitioner claims on an accounting the sum of thirty thousand dollars, with interest thereon from the date of said misappropriation to be due petitioner, the Omaha Tribe of Indians, from the United States of America.

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VII.

That the petitioner, the Omaha Tribe of Indians, claims on an accounting from the defendant, the United States of America, that there is due to petitioner, the Omaha Tribe of Indians, the sum of twenty-five thousand dollars for subsistence furnished by the defendant, the United States of America, to the Ponca and the Winnebago tribes of Indians from the funds, lands, and property of the Omaha Tribe of Indians in and about the years 1864 to 1866, inclusive. Wherefore, the petitioner sues the United States of America and demands on account of the matters and things set forth in this paragraph the sum of twenty-five thousand dollars.

VIII.

That the petitioner, the Omaha Tribe of Indians, claims from the United States of America the sum of five thousand dollars for misappropriation of funds of said tribe for purposes not for the material benefit of said tribe, arising out of misconduct of an agent of the United States to the claimant tribe of Indians in, to wit, the year 1874, whereby, in violation of treaties between the petitioner, the Omaha Tribe of Indians, and the United States, and in violation of its duty to the petitioner as trustee, the United States of America through its Indian agent to petitioner, the Omaha Tribe of Indians, delivered to petitioner a large number of worn out, worthless cattle and oxen, in or about the year 1874, and compelled the petitioner, the Omaha tribe of Indians, to receipt for said cattle and oxen, that were in a dying condition, and to receipt for dead cattle and oxen.

That the aforesaid matter was repeatedly called, within a
18 seasonable time of the date thereof, to the attention of the defendant, the United States of America, and redress was promised to petitioner, but compensation therefor never was made to petitioner, the Omaha Tribe of Indians. Wherefore, petitioner, the Omaha Tribe of Indians, claims on an accounting between it, the Omaha Tribe of Indians, and the United States of America, the sum of five thousand dollars on account of the matters and things set forth in this paragraph of its petition.

IX.

That petitioner, the Omaha Tribe of Indians, claims a further sum due to it, the Omaha tribe of Indians, from the United States on an accounting between them for funds of the United States misappropriated for purposes not for its material benefit, and for moneys charged up contrary to treaty stipulation to the petitioner, the Omaha

Tribe of Indians, which should be charged to the United States of America on a true accounting between them. That petitioner is unable to state at this time the details of said matters of accounting, save that certain of said matters concern wagons furnished petitioner, the Omaha Tribe of Indians, by the United States in or about the year 1874, and that were grossly unfit for use and fraudulently overvalued, and for buildings charged against the funds of petitioner, the Omaha Tribe of Indians, though properly chargeable to the United States, but claims on full accounting the sum of not less than twenty-thousand dollars as due to the petitioner, the Omaha Tribe of Indians, on a true and just accounting between petitioner and the United States under provisions of the act of June 22, 1910, referring this cause to this court.

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X.

RECAPITULATION.

Claim I: For lands north of the division line established by article 1 of the treaty of March 16, 1854, taken by the United States as trustee for petitioner, sold by the United States and the proceeds misappropriated to the credit of the United States and not accounted for to the petitioner, the Omaha Tribe of Indians, six hundred and twenty-five thousand dollars, with interest	$625,000.00
Claim II: For moneys agreed to be expended under the terms of the treaty of March 16, 1854, in the removal of petitioner, the Omaha, Tribe of Indians, from its lands ceded by the treaty aforesaid to the new home of petitioner and subsistence thereon, but not expended as agreed, forty-two thousand dollars, with interest	42,000.00
Claim III: For failure to protect the life, limb and property of petitioner as guaranteed by the United States, one hundred and ninety thousand dollars	190,000.00
Claim IV: For timber of petitioner spoliated by defendant or its citizens, fifty thousand dollars	50,000.00
20 Claim V: For funds of petitioner misappropriated by the agents of the United States and expended for the personal benefit of said agents of the United States and not paid to or expended for purposes of material benefit to petitioner, thirty thousand dollars	30,000.00
Claim VI: For subsistence compelled to be furnished by petitioner to the Ponca and Winnebago Tribes of Indians, contrary to treaty stipulations and the duty of the United States of America, twenty-five thousand dollars	25,000.00
Claim VII: For funds of petitioner misappropriated for purposes not for its material benefit and violation of the duty of the United States as to cattle and oxen supplied to petitioner, or charged to petitioner, five thousand dollars	5,000.00
Claim VIII: For amount due on a true accounting between petitioner and the United States, twenty-five thousand dollars	25,000.00
Total	$992,000.00

in which aforesaid sum of $992,000 petitioner, the Omaha Tribe of Indians, prays this court to decree the defendant, the United States of America, indebted to the Omaha Tribe of Indians, on an accounting between them, and that petitioner may have such other and further relief as the nature of the cause of petitioner may require and as to this honorable court may seem meet and proper.

21 XI.

That in and by the aforesaid act of June 22, 1910, referring the claims of petitioner, the Omaha Tribe of Indians, against the United States, to this court, it was provided that this court should fix the fee or compensation to be paid by petitioner, the Omaha Tribe of Indians, to the attorneys representing petitioner in this cause.

That in and by the aforesaid jurisdictional act approved June 22, 1910, it was provided:

"The petition (in this cause) shall be verified by the attorney employed by the said Omaha Indians, to prosecute their claims under this act, under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as provided by law. * * * Upon the final determination of the cause the Court of Claims shall decree such fees as the court shall find to be reasonable to be paid to the attorney or attorneys employed by the said tribe of Indians, and the same shall be paid out of any sum or sums found due said Omaha Tribe of Indians: Provided, That in no case shall the fees decreed by said court be in excess of the amount stipulated in the approved contract nor amount to more than ten per centum of the amount of the judgment recovered in such cause."

That petitioner, pursuant to the terms of the aforesaid act approved June 22, 1910, entered into a contract with the law firm of Kappler & Merillat, consisting of Charles J. Kappler and Charles H. Merillat, of Washington, D. C., and Hiram Chase, as attorneys of petitioner in this cause. That said contract was approved by the Commissioner of Indian Affairs and the Secretary of the In-
22 terior in an amount not to exceed ten per centum of the amount of the judgment recovered in this cause, but in no event to exceed the sum of twenty-five thousand dollars. That petitioner prays this court upon a final determination in this cause to fix the fees to be paid by the petitioner, the Omaha Tribe of Indians, to the attorneys herein named in accordance with the terms of the contract between them and the statute in this case made and provided.

Wherefore the petitioner prays for judgment against the United States in the total sum of nine hundred and ninety-two thousand dollars, with interest on the several amounts herein as claimed, and for such further relief as petitioner, the Omaha Tribe of Indians, may be entitled to receive against the defendant hereto, the United States

of America, both at law and in equity in the premises and that the court decree the fee to be paid the attorneys representing petitioner.

THE OMAHA TRIBE OF INDIANS,
Petitioner.
By their Attorney, Hiram Chase.

KAPPLER & MERILLAT,
Attorneys for Petitioner.
HIRAM CHASE,
of Counsel.

23 COUNTY OF THURSTON,
State of Nebraska, ss:

Hiram Chase, being first duly sworn, deposes and says: That he is a member of the Omaha Tribe of Indians and an attorney-at-law by profession; that he is one of the attorneys employed by the said Omaha Tribe of Indians to prosecute its claims against the United States of America under an act of Congress approved June 22, 1910; that said contract of attorneyship has been approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as required by law; that affiant has read the foregoing petition setting forth the claims of the petitioner, the Omaha Tribe of Indians, against the United States, and that upon information and belief affiant avers the facts stated in the foregoing petition are true to the best of his knowledge, information, and belief.

HIRAM CHASE.

Subscribed and sworn to before me, this 15th day of June, A. D. 1911.

[SEAL.]

A. P. COLEMAN,
Notary Public.

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II. General traverse.

Court of Claims.

THE OMAHA TRIBE OF INDIANS,
vs.
THE UNITED STATES. } No. 31002.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34.

III. Defendants' counterclaim. Filed Nov. 27, 1917.

Now come the defendants, by their Attorney General, and allege that the Omaha Tribe of Indians, the plaintiffs in this cause, was at the commencement of this suit and still is justly indebted unto the United States in the sum of $58,800, being the value of the reservation con-

taining 300,000 acres of land set apart for said Omaha Tribe of Indians on the Missouri River, at Black Bird Hills, Nebraska, in lieu of the same number of acres of land reserved by the treaty of March 16, 1854 (10 Stat., 1043), north of the line drawn due west from the mouth of Aoway Creek for the home of said tribe upon the
25 ground that the lands so reserved north of said Aoway Creek line was not the property of the Omaha Tribe, but belonged to the Ponca Tribe of Indians at the date of said treaty, and the consideration for the grant of said reservation to said Omaha Tribe, as aforesaid, totally failed.

Wherefore the defendants file this counterclaim and pray judgment against plaintiff, the Omaha Tribe of Indians, in the sum of $58,800.

HUSTON THOMPSON,
Assistant Attorney General.

IV. Replication. Filed in open court, April 4, 1918.

Now come the claimants and for replication to the counter claim filed herein by the United States, deny that the Omaha Tribe of Indians, petitioners, is indebted to the United States in any sum whatsoever as set forth in said counterclaim, and deny that the lands north of Aoway Creek, reserved by the treaty of 1854 as a home for the Omaha Indians, did not belong to the said Indians, and state that the same did belong to the said Omaha Tribe of Indians and their rights thereto were recognized and conceded to them by the United States, by its officials acting for it in the making of the treaty for the cession of the same to the United States, and that said United States under said treaty did take possession of, claim, and appropriate to itself under said treaty with the petitioners the lands embraced within the alleged counter claim.

KAPPLER & MERILLAT,
HIRAM CHASE,
Attorneys for Petitioners.

COUNTY OF ——,
State of Nebraska, ss:

26 Hiram Chase, being first duly sworn, deposes and says: That he is one of the attorneys for the Omaha Tribe of Indians, claimants in the above entitled cause, and also a member of said tribe of Indians, and that according to the best of his knowledge, information, and belief the matters and things set forth in the above replication signed by him are true.

HIRAM CHASE.

Subscribed and sworn to before me this 30th day of March, 1918.
[SEAL.] HARRY A. WALTERS,
Notary Public.

My commission expires June 9, 1920.

V. History of proceedings.

On April 4, 1918 this case was argued and submitted on merits by Mr. Charles H. Merillat, for the claimants, and by Mr. George M. Anderson, for the defendants.

On April 22, 1918 the court handed down findings of fact and conclusion of law, and entered judgment for the claimants in the sum of $122,295.31, with an opinion by Hay, J.

On May 21, 1918 the defendants filed a motion for amendment of findings and for a new trial.

On June 10, 1918, the court filed an order allowing in part and overruling in part the defendants' motion to amend findings. Former findings, judgment, and opinion were withdrawn and
27 new findings, conclusions of law and judgment entered for claimants in the sum of $122,295.31, with an opinion by Hay, J., which are as follows:

VI. Findings of fact, conclusion of law, and by Hay, J. Filed June 10, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

The act of Congress approved June 22, 1910, provided as follows: "That all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under the treaty between the United States and the said tribe of Indians, ratified and affirmed March 16, 1854, or under any other treaties or laws, or for misappropriation of any funds of said tribe not for its material benefit, or for failure of the United States to pay said tribe any money due; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all legal and equitable claims, if any, of said Omaha Tribe of Indians against the United States, and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said tribe, and to enter judgment thereon. The Court of Claims shall advance said cause upon the docket, and shall have authority to settle the rights, both legal and equitable, of both the Omaha Tribe of Indians and the United States, notwithstanding lapse of time or statutes of limitation, and the final judgment and satisfaction thereof shall be a full settlement of all claims of said Omaha Indians against the United States."

II.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, provides:

"ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of the line: Provided, however, that if the country north of said due west line,
28 which is reserved by the Omahas for their future home, should not, on exploration, prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in council express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

"ARTICLE 2. The Omahas agree that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be."

III.

The Omaha Indians were not satified with the country to the north of the due west line mentioned in article 1 of the treaty of March 16, 1854, and duly elected to take for their future home a tract of country of 300,000 acres south of said line. This fact was reported to the President and by his direction a tract of 300,000 acres south of said line was set apart for the Omaha Indians.

The area of land north of the due west line mentioned in article 1 of the aforesaid treaty is 783,365 acres which belonged to said Omaha Indians, and after deducting therefrom the 300,000 acres set apart for the Omaha Indians in accordance with the provisions of

the aforesaid treaty there is an excess of 483,365 acres for which the Omaha Indians have not been paid.

The price per acre which the United States agreed to pay for this excess of land is 19.6 cents, and amounts to the sum of $94,739.54.

IV.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, provides:

"ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land
29 at their new home, they shall receive from the United States the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve."

There was expended by the officials of the Government in carrying out the provisions of the above article of the treaty the sum of $23,453.21; the balance of the $41,000 agreed to be paid by said article to the Omahas, together with other moneys of said tribe, remained in the hands of the Indian agents and are carried over to the item of the claim of the plaintiffs dealing with misappropriation of Omaha moneys by Indian agents, the facts pertaining to which will be found in Finding VII.

V.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, in the seventh article thereof provides that: "Should the Omahas determine to make their permanent home north of the due west line named in the first article the United States agree to protect them from the Sioux and all other hostile tribes as long as the President may deem such protection necessary, and if other lands be assigned them the same protection is guaranteed."

After the treaty of 1854, and after the Omahas had removed to their new homes, the Sioux made repeated attacks upon them in the year of removal and subsequent years. The United States were called upon by the Omahas to protect them as was provided in the treaty. No protection of any kind was afforded the Omahas by the United States. Protection was necessary as soon as the Omahas removed to their new home and for several years thereafter. The Sioux killed 22 Omahas and stole 152 horses. The Winnebagoes stole from the Omahas 173 horses for which they have been paid. The average value of horses and ponies at that time was $30 per head. It does not appear what price one tribe should pay to another for killing a member of the tribe. One hundred and fifty-two horses at $30 per head amounts to the sum of $4,560.

VI.

There was a large amount of timber stolen from the Omaha reservation by Omaha Indians without the knowledge or consent of the agent.

VII.

Two of the Indian agents of the United States who were charged with the disbursement of Omaha treaty funds to the Omahas defaulted with funds belonging to the Omahas in the sum of $18,202.19. Agent Hepner defaulted in the sum of $15,068.80 on August 3, 1856, and Agent Robertson defaulted in the sum of $3,133.39 on August 11, 1858. The United States has never repaid to the Omahas the aforesaid sum of $18,202.19.

VIII.

James P. Williams under his contract of June 1, 1867, delivered on September 10, 1867, to Superintendent H. B. Denman at Omaha, Nebr., 103 head of stock cattle, for which he was paid $3,432.99 out of money belonging to the Omahas. These cattle when they reached the reservation were in bad condition and 50 of them died. These cattle were of an average value of $33.33 per head. Fifty cattle were worth the sum of $1,666.50.

IX.

In 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. It appears that this building was not used, and it was not such a building as was contemplated by the treaties between the United States and the Omaha Tribe of Indians. This building cost $4,738, of which $3,127.08 was paid out of money belonging to the Omahas and $1,610.92 out of the money belonging to the Winnebagoes.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the amount shown in Finding III, to wit, the sum of $94,739.54; the amount shown in Finding V, to wit, the sum of $4,560; the amount shown in Finding VII, to wit, the sum of $18,202.19; the amount shown in Finding VIII, to wit, the sum of $1,666.50; and the amount shown in Finding IX, to wit, the sum of $3,127.08. It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of one hundred and twenty-two thousand two hundred and ninety-five dollars and thirty-one cents ($122,295.31).

Opinion.

HAY, *Judge*, delivered the opinion of the court:

This case is here for decision by virtue of an act of Congress approved June 22, 1910, which act is set out in full in Finding I.

On March 16, 1854, the United States entered into a treaty with the Omaha Tribe of Indians. By the first article of this treaty it is provided that the Omaha Indians cede to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of that river due east of where the Ayoway River disembogues out of the bluffs to the western boundary of the Omaha country. The treaty further provides that if the country north of said due west line should not prove a satisfactory and suitable location for the Omaha Indians the President may, with the consent of the Indians, set apart and assign to them within or outside of the ceded country a residence suited for and acceptable to them, which shall not be more in extent than 300,000 acres. Then in that case all of the country belonging to said Indians north of the due west line shall be ceded to the United States, and the United States agreed to pay the same per acre for it as they agreed to pay for the land south of said line, after deducting from the land so ceded the number of acres set apart for said Indians.

From the evidence in this case it appears that the number of acres belonging to the Omaha Indians north of the due west line, and ceded by them to the United States, was 783,365; the number of acres set apart for them under the terms of the treaty south of the due west line was 300,000, leaving 483,365 acres, for which the United States agreed to pay them the same price per acre as they agreed to
31 pay for the land ceded south of said due west line. The land ceded by the Omahas to the United States south of said line contained 4,500,000 acres, for which the United States agreed to pay the sum of $881,000, thus making the treaty price nineteen and six-tenths cents per acre.

It does not appear, nor is it contended by the defendants, that they have ever paid anything to the Omaha Indians by virtue of this treaty. The contention of the defendants is that the Omaha Indians never owned any land north of the due-west line above referred to, and never had the right to cede the land to the defendants. At the time the treaty was made the United States recognized the Omahas as having title to this land north of the due-west line, and specifically promised to pay for it. Those making the treaty for the United States were w ll acquainted with the country; they knew what the Omahas claimed; they knew that their possession and occupation of this land was considered with reference to their habits and modes of life; that the Indians had a right to the exclusive enjoyment of it in their own way until they abandoned the land or ceded it to the Government; their right of occupancy was considered as firmly established—this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not

now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it.

The treaty provides that the United States shall pay to the Omaha Indians the sum of $41,000 to enable the Indians to remove and subsist themselves for one year in their new home, and for other purposes set forth in the fifth article of the treaty. The Government expended $23,453.21 in carrying out the provisions of the treaty: the balance of the $41,000 was placed in the hands of the Indian agents of the Government to be expended for the purposes set out in the treaty. It appears that these agents misappropriated the sum of $18,068.80, and that amount was never accounted for nor expended for the benefit of the Indians. The Indians are entitled to this money.

The amounts found to be due the Indians in the fifth, seventh, eighth, and ninth findings are supported by the evidence, and are allowed under the provisions of the treaty of March 16, 1854.

A judgment will therefore be entered for the sum of $122,295.31. It is so ordered.

32 *VII. Judgment of the court.*

At a Court of Claims held in the City of Washington on the tenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the claimants, and do order, adjudge, and decree that the Omaha Tribe of Indians, as aforesaid, are entitled to recover and shall have and recover of and from the defendants, the United States, the sum of one hundred and twenty-two thousand two hundred and ninety-five dollars and thirty-one cents ($122,295.31).

BY THE COURT.

VIII. Proceedings had after entry of judgment.

On June 11, 1918 the claimants filed a motion for an amendment of findings and for a new trial, which motion was overruled by the court on June 17, 1918.

33 *IX. Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 10th day of June, 1918, in favor of the claimant, the defendants, by their attorney general, on the 12th day of July, 1918, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

X. Claimants' application for, and allowance of, cross-appeal.

Now comes the petitioner in the above-entitled cause, the Omaha Tribe of Indians, by its attorneys, Kappler & Merillat (Charles H. Merillat & Charles J. Kappler), and moves the court for an allowance of an appeal to the Supreme Court of the United States in the above-entitled cause, or, in the alternative, for the allowance of a cross-appeal to the Supreme Court of the United States in the event that the court heretofore has allowed an appeal to the defendant herein.

THE OMAHA TRIBE OF INDIANS,
By C. J. KAPPLER & C. H. MERILLAT,
Attorneys.

Filed August 23, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

34 Court of Claims.

THE OMAHA TRIBE OF INDIANS
vs.
THE UNITED STATES. } No. 31002.

I, Samuel A. Putman, chief clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court; of the judgment of the court; of the defendants' application for, and allowance of, an appeal to the Supreme Court of the United States, and of the claimants' application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City, this 24 day of October, A. D. 1918.

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

(Endorsed:) File No. 26,823. Court of Claims. Term No. 737. The United States, appellant, vs. The Omaha Tribe of Indians. File No. 26,824. Term No. 738. The Omaha Tribe of Indians, appellant, vs. The United States. Filed November 20th, 1918. File Nos. 26,823 and 26,824.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1919

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,
v.
THE OMAHA TRIBE OF INDIANS, APPELLEE. } No. 243.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY ADDITIONAL FINDINGS OF FACT AND BRIEF.

The appellant, by the Solicitor General, moves the court for an order directed to the Court of Claims requiring the said court to make and certify as part of the record here, findings of fact on the following questions of fact, to wit:

I.

Whether the lands north of the due west line from the mouth of Aoway Creek bounded on the south by the said due west line, on the east and north by the Missouri River, and on the west by a straight line from the mouth of the Niobrara River to the said due west line, containing 783,365 acres, belonged at the date of the treaty of March 16, 1854, by the Indian title of occupancy and possession to the Omaha or Ponca Tribe of Indians?

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II.

Whether or not the Indian title to said lands was afterwards conceded by the United States to be in the Ponca Tribe of Indians and ceded by said tribe to the United States by the treaty of March 12, 1858?

STATEMENT.

Among others the following findings of fact were requested by appellant in the Court of Claims:

By treaty between the United States and the Ponca Tribe of Indians of March 12, 1858, it was provided:

> ARTICLE 1. The Ponca Tribe of Indians hereby cede and relinquish to the United States all the lands now owned or claimed by them, wherever situate, except the tract bounded as follows, viz: Beginning at a point on the Niobrara River and running due north, so as to intersect the Ponca River twenty-five miles from its mouth; thence from said point of intersection, up and along the Ponca River, twenty miles; thence due south to the Niobrara River; and thence down and along said river to the place of beginning; which tract is hereby reserved for the future home of said Indians.
>
> By the above treaty the Ponca Indians ceded to the United States all of those lands theretofore possessed by them bounded on the west by the east line of the Sioux Nation, as established by the Laramie treaty of 1851, from the forks of the Platte to the mouth of

the White River; on the north and east by the Missouri River; and on the south by the due west line from the mouth of Aoway Creek to the Sioux east line.

X.

The Poncas were in possession of and hunted over from time immemorial all of that country bounded by the Missouri River on the north and east, by the due west line from the mouth of Aoway Creek on the south, and by the east line of the Sioux Nation, established by the Laramie treaty of 1851, on the west.

The Omaha country was bounded on the north by the due west line from the mouth of Aoway Creek, on the east by the Missouri River, on the south by the Platte River, and on the west by Shell Creek and a line drawn due north from the headwaters of Shell Creek to the Aoway Creek due west line, and contained 4,500,000 acres of land, for which they were paid $881,000 in money, at the rate of $19.6 per acre.

After the findings were made by the court, the Government filed its motion for an amendment thereof, requesting that Finding III be amended as follows:

III.

In lieu of the second paragraph thereof:

The area north of the due west line from the mouth of Aoway Creek, south and west of the Missouri River and east of a line drawn

due south from the mouth of the Niobrara River, contains 780,300 acres, which, after deducting therefrom the 300,000 acres set apart for the Omahas, in accordance with the provisions of said treaty, left an excess of 482,300, for which the Omahas have not been paid.

To be added at the end of said Finding No. III:

The country north of the due west line aforesaid, at the time the treaty of March 16, 1854, was made with the Omahas, belonged to the Ponca Tribe of Indians by the ordinary and usual Indian title of occupancy and possession, and prior to the making of said treaty had never been possessed or claimed by the Omahas. Mr. Manypenny in his report to the Secretary of the Interior in 1854 stated that the northern boundary of the Omaha cession was 42 degrees 40 minutes north latitude. The area between the due west line aforesaid and 42 degrees 40 minutes amounted to 327,680 acres.

This motion was overruled.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

BRIEF.

This suit was brought in the Court of Claims under a special jurisdictional act approved June 22, 1910 (36 Stat. 540; Rec. p. 15). The claim consisted of a number of items, but this motion relates only to item No. 1, claiming compensation for certain lands alleged to have been ceded by the Omaha tribe to the United States by Article I of the treaty of March 16, 1854, lying north of the line drawn due west from the mouth of Aoway Creek, in the State of Nebraska, near where the city of Ponca now stands. (10 Stat. 1043; Rec. 16.)

At the trial of the case in the Court of Claims, the United States submitted to the court evidence beyond question sufficient to establish the fact that the Omaha Tribe had never owned, claimed, or possessed any lands north of said due west line from the mouth of Aoway Creek, prior to the date of the treaty of March 16, 1854, but that the lands in question had been from time immemorial to the date of said treaty owned by the Ponca Tribe by the ordinary and usual Indian title of occupancy and possession.

The Court of Claims, however, refused to go into the question of the Indian title to said lands or allow the evidence to be discussed, upon the ground that the United States was estopped from denying the ownership of said lands by the Omaha Tribe by the treaty of 1854.

The only evidence considered by the lower court related to the acreage of the lands north of the due west line from the mouth of Aoway Creek which it found to be 783,365 acres, and the acreage and price of the lands south of said due west line stated in the opinion as 4,500,000 acres at $0.196 per acre, amounting to $881,000 (Rec. pp. 16, 19). The opinion of the lower court therefore as to item No. 1 is confined to conclusions of fact and law drawn from Article I of the treaty of March 16, 1854, and these conclusions are not justified by the language of the treaty.

By Article I of the treaty of March 16, 1854 (Rec. 16), the Omahas ceded absolutely to the United States all of their lands west of the Missouri River and south of the line drawn due west from the main channel of said river where Aoway Creek flows into it, with a proviso that if the country north of said due west line should not on exploration prove satisfactory and suitable to said Indians, the President should set apart for them a reservation within or outside of the ceded country, and for the purpose of determining whether the country was suitable a delegation of said Indians was to be, immediately after the ratification of the treaty, sent to examine the reserved country, and if found satisfactory should be considered as their home, but if not, the President was authorized to set apart a suitable reservation for them not exceeding in extent 300,000 acres, "and then and in that case *all of the country belonging to said Indians north of said due west line is hereby*

ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

The lower court begins its discussion of the treaty with the statement that "It does not appear, nor is it contended by the defendant, that they have ever paid anything to the Omaha Indians by virtue of the treaty." This statement is erroneous, as the Omahas received the consideration of $881,000 for the lands south of the due west line from the mouth of Aoway Creek. No doubt the statement was intended to apply to the lands north of said line, which would be correct.

The substance of the discussion of the treaty of 1854 was that the Government knew, or should have known, that the Omahas owned all of the lands north of said due west line to the Missouri River before making said treaty, and "this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it." (Rec. 19, 20.) The statement in the third finding of fact of the court, in arriving at the acreage on which to base its judgment that "The area of the land north of the due west line mentioned in Article I of the aforesaid treaty is 783,365 acres which *belonged* to said Omaha Indians," (Rec. 16) was not based upon evidence as to the Indian title

to said lands, but was merely a deduction from the court's construction of the treaty.

The reasoning of the court in its opinion, we think, is based on too narrow a view of the provisions of the treaty of 1854.

It must be borne in mind that the area for which the judgment of the court was rendered extended from the due west line from the mouth of Aoway Creek to the Missouri River on the north and contained 783,365 acres.

If the Omaha Indians owned at the time of the treaty of 1854 all of the country bounded on the south by the Aoway Creek due west line and the Missouri River on the east and north, why was the distinction made between the country north and south of said line? Why was the line drawn due west from Aoway Creek and the area of their proposed reservation north of said line fixed at 300,000 acres? Why were they to be paid for lands *belonging* to them north of said line in excess of 300,000 acres instead of to the Missouri River, if that was their northern boundary? If this country north of said line was the old home and hunting ground of the Omahas, why was it necessary for a delegation accompanied by their agent to explore it in order to discover whether it was suitable for a reservation?

These questions, we believe, are answered by certain facts to which we shall refer:

Mr. Manypenny, Commissioner of Indian Affairs, who signed the treaty of 1854 on behalf of the United

States, in his annual report for the year 1854 to the Secretary of the Interior on the Omaha and other treaties (p. 5), places the northern boundary of the Omahas at the date of the treaty at 32 degrees, 40 minutes north latitude, and when the total area of the reservations of the different tribes, stated in his report as 15,000,000 of acres, is divided among them according to the different treaties, the reservation of the Omahas amounts to about 300,000 acres. The area of the reservation to be set apart as a home for the Omahas was estimated at 300,000 acres, because it was approximately the area between the due west line from the mouth of Aoway Creek and 42 degrees and 40 minutes. The actual amount of this area computed by the Land Office for use in this case was found to be 327,680 acres. Therefore if the construction of the lower court is to be followed—that the Government can not go back of the treaty to ascertain the Indian title to these lands, according to the treaty itself—the Omahas were only entitled to be paid for the excess of 27,680 acres instead of 483,365 acres, as held by the Court of Claims, to be paid at the same rate as the lands south of said due west line. (Rec. 16, 17.) It may be said in passing that the interest of the Omahas in such lands can not well be considered as in the nature of a quit-claim, as the price paid for the lands south of said line, which unquestionably belonged to them, was at the same rate.

Capt. Eastman of the Army in 1854 compiled a map showing the Omaha Reservation as extending from

the due west line from the mouth of Aoway Creek to the Missouri River on the north. This map has an indorsement thereon by Mr. Manypenny, dated August 5, 1854, to the effect that he had examined the said map in regard to the Indian reservations and found the same correct. This map, the Land Office states, is grossly incorrect, placing the Niobrara or L'eau Qui Court River nine miles too far south, the due west line from the mouth of Aoway Creek two and a half miles too far north, the bend of the Missouri River three and a half miles too far south, and the Mauvaises River, fixed as the western boundary of the Omaha Reservation, eighteen and three-fourths miles too far east. This map was afterwards corrected by officials of the Interior Department so as to show the Ponca residence in the disputed territory southeast of the Niobrara River, and the Ponca claim as extending south of the due west line to the mouth of the Aoway Creek.

Mr. Manypenny, in his report to the Secretary of the Interior Department for 1856, stated that the Poncas inhabited and cultivated lands in the disputed territory, and Superintendent Cumming of the St. Louis Superintendency for the same year reported that "they inhabited the valley of the L'eau Qui Court and the adjacent country *below* that river," which would bring them well into the lands in controversy.

If it should be held that the treaty of 1854 concedes the title to the country up to 32 degrees 40

minutes to the Omahas, the Government is not estopped by that limitation from going into the Indian title to all of the country from the due west line from the mouth of Aoway Creek to the Missouri River on the north, as the Omahas could only legally cede to the United States territory which actually belonged to them.

Historical and official records and maps show conclusively that the Ponca Indians owned the country north of said due west line from the mouth of Aoway Creek. For instance, the Lewis and Clark report and map; the map of Father DeSmet, the Jesuit Missionary, made in 1851 for the purpose of determining the limits of the Laramie treaty of 1851, and afterwards used in all treaties with the Sioux Indians since that time, one of the most valued maps in the Congressional Library; the map of the American Fur Trading Company from 1807 to 1843, and practically all of the old maps and writings prior to the date of the treaty of 1854.

The appellees, as a matter of fact, are forced to rely almost exclusively on the language of the treaty of 1854 and the discredited Eastman map and the depositions of living Omaha Indians taken under the rules of the court in this case. The appellant has, however, also taken the depositions of living Ponca Indians, but relies mainly on the old records and maps to show the location of the Ponca and Omaha Indians up to the date of the treaty of 1854.

The Interior Department in reporting on this case said: "The papers examined do not show that the Omahas ever possessed or claimed the lands north of the line running westward from the mouth of Aoway Creek, except by the treaty of 1854."

There was a map filed in this case made by the Land Office from the records in the Interior Department which shows that the lands of the Ponca Indians ran even farther south of the due west line from the mouth of Aoway Creek.

Mr. Charles E. Mix, Commissioner of Indian Affairs, reported to the Secretary of the Interior on January 11, 1858, that in his opinion the Ponca Indians were the owners of part of the land ceded by the Omahas by the treaty of 1854, and it appears from his report that he was influenced in this opinion partly by the fact that the treaty between the Poncas and the United States of 1825 was made in the country in dispute, north of said due west line, and a diagram, also referred to in his report, which shows the proposed cession of the Poncas and is a reproduction of the map of Father DeSmit, heretofore described.

The treaty of March 12, 1858 (between the United States and the Ponca Indians), was signed by Commissioner Mix on the part of the United States, who in his letter submitting the treaty to the Secretary of the Interior said: "The Poncas inhabit the region or country on the west side of the Missouri River, commencing about fifty miles north of the Platte,"

which would place them in possession of all the country from the due west line from the mouth of Aoway Creek to the Missouri River on the north. This land was included in the lands ceded by the Poncas, as shown by the said diagram.

The report of the Committee on Indian Affairs of the Senate on the bill to refer the claim to the Court of Claims shows that the committee had before it and considered the treaty of 1854, and that it either had, or could have had, the Eastman map, as originally made, showing the complete claim of the appellees to the land north of the due west line from the mouth of Aoway Creek. The committee also had the claim of the appellees for compensation for 800,000 acres north of said due west line less 300,000 acres for a reservation, or 500,000 acres at 14 cents per acre. The appellees afterwards used the identical figures in their petition filed in the Court of Claims. The committee stated in its report that the Government did not contend that the Omaha Indians had ever received payment for the excess, but contended that it had been covered by some general settlement or course of dealing between the Government and said Indians.

In this connection it is proper to state that the only settlement of this question by the Government was the payment for these lands to the Ponca Indians.

If Congress had recognized the absolute justice of this claim, it could have been settled without the useless formality of a reference to the Court of Claims,

as the committee had all of the data for the necessary computation as to the amount of land and the price to be paid per acre.

The Secretary of the Interior in transmitting the report of the Senate Committee on Indian Affairs on the bill conferring jurisdiction on the Court of Claims said: "In the first place there seems to be some doubt as to whether the Omahas really owned the land north of the due west line to which reference has been made," and the jurisdictional act itself, among other defenses, provides that the Government may set up a counterclaim, and the only counterclaim that could possibly be set up in this case is the counterclaim for the reservation of 300,000 acres for which no consideration was given to the Government if all of the lands above the due west line from the mouth of Aoway Creek belonged to the Ponca Indians.

This court has said that a jurisdictional act makes no admission of liability nor any ground of liability but merely provides a forum for the adjudication of a claim. (*United States* v. *Mille Lac Indians*, 129 U. S. 498, 500.)

It is therefore clear that Congress intended by the jurisdictional act that the Court of Claims should determine the question of ownership of the lands north of said due west line and make an ultimate finding of fact as to such ownership. The result of the refusal of the lower court to go into the question of ownership renders it impossible for the appellant

to present the question of law as to whether the Government having purchased the same lands afterwards from the real owners, the Ponca Indians, is also liable to the Omahas.

The appellant submits that either party to a suit has a right to have any fact on which he relies to base a proposition of law, found by the Court of Claims, if such fact is material and is sustained by the evidence. (*United States* v. *Adams*, 9 Wall., 661; *United States* v. *Driscoll*, 131 U. S. Appendix CLIX; *Ripley* v. *United States*, 220 U. S. 491; Id 222 U. S. 144.) The appellant does not believe that the lower court was justified in cutting the ground from under it so that an argument of law could not be presented to this court, which may possibly take a different view of these facts.

It is respectfully submitted that for the reasons heretofore stated, the Court of Claims should be required to make the additional findings requested.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 243.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS, APPELLEE.

BRIEF OF APPELLEE IN OPPOSITION TO MOTION BY APPELLANT FOR AN ORDER REQUIRING THE COURT OF CLAIMS TO MAKE AND CERTIFY ADDITIONAL FINDINGS OF FACT.

Counsel for Appellant has moved the Court to direct the Court of Claims:

1. To find whether the lands between Ayoway Creek, in the State of Nebraska, on the south and the Missouri river on the north belonged when the Omaha Indian treaty of 1854 was made to the Omaha or Ponca tribe of Indians.

2. Whether the Indian title to the lands between the creek and river named was conceded by the United States by the Ponca Indian treaty of March 12, 1858, to belong to the Ponca tribe.

Appellee objects to this order being made and to the attempt of Appellant to bring coercion to bear on the

Court of Claims to find specific facts contrary to the proof adduced before the Court of Claims, in favor of Appellant.

1. Because the Court of Claims has in fact as the record (Finding III trans. rec., pp. 16-17), shows already found that the land in question (placed by the Court to the disadvantage of the appellee Indians at only 783,365 acres), "belonged to said Omaha Indians" (p. 16). The issue as to which tribe of Indians owned the land was squarely put in issue by the pleadings, the United States in order to defeat the Omahas having filed a counter claim (rec., p. 13-14) for $58,000 on the allegation that the land between Ayoway Creek and the Missouri river on the north, being the very lands in question, "was not the property of the Omaha Tribe, but belonged to the Ponca Tribe of Indians at the date of said treaty" (Omaha treaty of March 16, 1854), and Appellee having by replication (p. 14) joined issue on the counter claim and asserted "that the same did belong to the said Omaha Tribe of Indians."

2. That there is no necessity for nor would there have been any materiality in a finding by the Court of Claims as to whether the United States by the Ponca treaty of March 12, 1858, conceded the Indian title to the land in question to be in the Ponca tribe of Indians. The Court of Claims was vested with jurisdiction to determine the claim of the Omaha tribe only. When it found that the lands in question in 1854 did *belong to the Omaha tribe* it completely exercised its jurisdiction. It is true that a finding that the lands in 1854 belonged to the Omaha tribe by inference almost necessarily excludes a finding the Indian title in 1858 was in the Poncas, but the Court would have traversed beyond its au-

thority had it undertaken to make the second finding appellant requests this Court to require. This second finding really is one of law and a casual perusal of the Ponca treaty of March 12, 1858 (12 Stats., 997) will show that that treaty did not deal with or undertake to deal with the lands in question but was merely designed to settle the roving, lawless Poncas on a defined small reservation (outside any lands claimed by the Omahas) and, as incidental thereto, for a small consideration obtained from the Poncas a quit claim to any and all claims of any kind the Poncas might have against the United States, including claim to Sioux lands in Dakota.

Knowing it is protected by express Ponca treaty against liability to the Poncas the United States undertook to use that tribe who lived in Dakota and north of the Missouri as the record showed, to defeat the Omahas' claim, but was unsuccessful before the Court of Claims.

While unwilling the Court should order the Court of Claims to certify as to the two special findings of fact only requested by Appellant the Appellee is willing the Court of Claims certify the whole record to this court and has so moved in Case No. 244, wherein Appellee has cross appealed. Appellee below moved the Court of Claims to certify the whole record but it refused. Appellee made the motion believing the cause was a proceeding in equity and not at law; that the result would be a finding by this Court that the Omahas had Indian title north of a due west line drawn from Ayoway Creek to considerably more than the 783,365 acres found by the Court of Claims; that the Court would find Appellant as trustee liable to claimant on other items and in larger amounts than found by the Court below, and that this court would hold that in equity Appellee was en-

titled to interest on the money for the lands ceded north of Ayoway Creek by the Omaha treaty of 1854, which moneys should have been, after said treaty, placed in the Treasury of the United States at interest to the credit of Appellee but were not because Appellant could not decide how much land there was north of Ayoway Creek owing to its inability or unwillingness to determine a dispute between the Pawnee and Omaha tribes as to the western Omaha boundary line, the Omaha treaty of 1854 running a due west line from Ayoway Creek but not stating where the west line should end in the West and the Pawnee treaty of 1856 providing that the Pawnee *eastern* boundary should run to the place where the Omaha *western* boundary ended.

The Court of Claims in its original findings and judgment gave Appellee interest from 1854 at 5 per cent on the sum of $94,739.54 it found due Appellee by Appellant for the unpaid for lands north of Ayoway Creek (Finding 3, p. 17). Appellant moved the Court of Claims for a new trial, for amended findings of fact (substantially those embraced in its present motion) and opposed allowance of interest as prohibited by section 177 of the Judicial Code. The Court of Claims without giving Appellee opportunity to reply withdrew its original findings and its judgment and opinion allowing interest, overruled Appellants' motion for a new trial and for amended and additional findings of fact and struck out all allowance of interest to Appellant. The Appellant contends it is entitled to interest, that the Court was right in originally allowing it and that the Court below erred adversely to it in other respects that the full record would disclose. It prayed the Court of Claims to have the present record show its original finding and judg-

ment allowing interest, but the Court while allowing Appellees' appeal directed that the transcript of record should not show that interest, amounting to more than $200,000, had been originally allowed and then withdrawn.

Appellee believes the foregoing, without going into details, shows that the present motion of Appellant should be denied.

But to avoid repetition of same, Appellee submits below certain details, pertinent to this motion and also pertinent to the motion for the full record made by Appellee in Case No. 244, and asks that both motions be considered together.

When the Omaha tribe sued the United States the latter undertook a defense and sought, among other things, to claim that the Ponca tribe was entitled to the lands in northern Nebraska between Ayoway Creek and the Missouri river on the north, and not the Omahas.

The Omaha treaty of 1854 had clearly recognized by its express terms (p. 16) that there was more than 300,000 acres being ceded by the Omahas north of Ayoway Creek and that if the tribe refused to take this larger tract as its reservation (as the United States desired in order to have the Omahas as a buffer between the warlike Sioux and Poncas north of the Missouri river and the settlers who were pressing into eastern and southern Nebraska) and instead insisted on a smaller area of 300,000 acres south of Ayoway Creek in order to be removed from the Sioux that the Omahas should be paid for the excess acreage north of Ayoway Creek. The Omahas resisted some pressure from the United States and finally after insisting for nearly two years obtained the 300,000 acres to the south. The area north of Ayo-

way Creek was only, however, guesswork, surveys of Nebraska not beginning until in the sixties.

The Omaha western boundary line remained unsettled, article 1 showing the treaty did not place it (p. 16).

In 1857 the United States made a treaty with the Pawnee tribe (11 Stats., 729) and made the eastern boundary line of the Pawnees the western boundary line of the Omahas but did not undertake, as the Omaha treaty likewise had not undertaken (probably for expediency sake since the United States by the two treaties was acquiring for settlers all lands in Nebraska and the two tribes named between them owned and occupied all Nebraska north of the Platte and the United States was not acutely concerned with ascertaining how much in money it should apportion to the Omahas) to state where the intertribal boundary line was running north and south, the Pawnee treaty as to this boundary line simply reading, "on the east by the lands lately purchased by the United States from the Omahas." The two treaties therefore do not aid in determining this line. But, while leaving this west-east Indian tribal line undetermined the two treaties taken together, dispose of the present attempt by the United States to set up the Poncas as a stalking horse to defeat the Omaha claim. The Pawnee treaty provided that the northwestern boundary line of the Pawnees should be on the Keha-paha river and that the Pawnee northern boundary line should be as follows: "On the north by the Keyapaha river to its junction with the Niobrara L'eau qui Court or Running Water river; and thence, by that river, to the western boundary of the late Omaha cession." The effect therefore is to fix the treaty —recognized *Omaha northwestern* point as being on the Niobrara river. That river then continues east until it

flows into the Missouri river where the town of Niobrara City, Nebraska, now stands. The Missouri river at this point ceases to flow from the north but flows due east. The Omaha northern line therefore in fact ran, as it naturally would run, along the Niobrara river to the Missouri river and thence east by that river to where the Missouri river makes its next celebrated bend at the junction point of the States of Nebraska, South Dakota and Iowa and there it turned and flowed due south, passing on the way Ayoway Creek and thus forming both part of the northern and *all* of the eastern boundary of the Omaha tribe, as set forth in the Omaha treaty of 1854.

Indian Commissioner Manypenny, who made the Omaha treaty of 1854, adopted this natural river course boundary line for the Omaha tribe, and while in the absence of surveys, he erred 2½ miles in locating the latitude of Ayoway Creek and 9 miles in locating the latitude of the confluence of the Niobrara and Missouri rivers and similarly erred in a report in fixing 42 deg. 40 mins. as the latitude south of which the Omahas had ceded lands to the United States he did at the same time indicate what lands he had purchased and that the rivers named were the boundaries by filing a map signed by him in August, 1854, as bounding his Omaha purchase. This map shows the Omaha northern and eastern boundary as described. It is appended hereto for the court's inspection. It fixes the Missouri River as the Omaha tribe's eastern and northern boundaries.

The Court of Claims had this map before it and it properly gave, over appellants' strenuous objection that it should disregard the map and go not by water courses but by latitude and longitude lines in dealing with the illiterate Omahas, great weight to this map. Appellees'

objection to the Court of Claims action was that thereby the Court reduced unduly Appellees' acreage north of Ayoway Creek by shortening or moving too far east the western boundary line of the Omahas. The Court accepted the Land Office calculation of the area north of Ayoway Creek and west as far as the confluence of the Niobrara and Missouri rivers. It did this notwithstanding in 1856 Commissioner Manypenny the record shows officially stated that the western boundary line was not intended to be definitely fixed by his map but merely tentatively fixed and in 1857 the Indian Office conceded by the Pawnee treaty that the western line ran farther west than in the Manypenny map by making the boundary line between the two tribes run to a point on the Niobrara river and hence west of where placed by the map, namely, the confluence of the two rivers. Appellee desires the entire record because it will show the Omahas entitled by General Land Office calculations to several hundred thousand acres more than allowed by the Manypenny map western line calculations, and the United States having acquired this land in trust for the Omahas and never having paid for same should, *as trustee*, be required on settled equity principles be made to account for the same, with interest. In equity cases the entire record is required by this court of the Court of Claims, U. S. vs. Old Settlers, 148 U. S., 427.

The Manypenny map as to the Omahas being entitled to all land in Nebraska south of the Missouri and Niobrara rivers and the Poncas only to land north of those rivers in Dakota is supported in the record by the scientific Nicollet Fremont map of 1840 and the Colton map of Indian reservations of 1853.

It also was supported by official reports, introduced in the record, of Indian Office regulations and reports of

Indian agents from 1837 to 1856, all showing that those agents and regulations gave the land south of the rivers named to the Omahas and Pawnees and placed the Poncas north of the Missouri river and in Dakota some miles beyond and north of the confluence of the Niobrara and Missouri rivers. Kingsbury's History of Dakota Territory placed them at Fort Randall, thirty miles above the Niobrara and on Ponca Creek, in the vicinity of the fort.

The oral testimony of the oldest Omahas all was to the effect that they had hunted all over the area involved and also that they had old burying grounds and villages in and claimed the territory the Court of Claims conceded them and more lands besides, their hunting claims extending along the Niobrara river as far as the junction of the Niobrara and Keyapaha rivers, and some of them, with Ponca blood in their veins, speaking of visits they had made to the Poncas, they always crossing the Missouri on the north and then continuing further north to where the Poncas were situated.

The United States it is true did place on the stand certain Poncas who claimed for the Poncas the right to land from the White river far to the north and south of the Missouri river into the region here in dispute, but on cross-examination these witnesses admitted they were born and passed their youth on the "cold" side or *north* of the Missouri, that they make their complaints to Fort Randall, 30 miles north of the confluence of the Niobrara and the Missouri, that they had had a "great mourning" in 1858 because when their chiefs returned from Washington they were told the United States had rejected their claim to the Omaha reserve north of Ayoway Creek upon the Omahas electing to take a 300,000-acre reserve south of that creek. They admitted the Omahas and Poncas spoke the same language and had similar villages and buying grounds and it was proved that centuries be-

fore (by tradition) the Poncas as a wilder band had separated from the Omahas and moved so far north that they had lost the use of corn and had only in later years attempted to return south.

With all these facts before it Appellee submits the Court of Claims finding is conclusive and is a "special verdict" in the Omahas favor unless this Court as the Appellee is willing it should, will examine the whole record and pass for itself on the facts.

When the Court of Claims found against Appellant the United States made a motion in the lower court similar to the instant motion saying, inter alia. "The specific ground of objection is that the record does not support the statement that the country north of the due west line from the mouth of Ayoway Creek belonged to the Omaha Indians," and also that Commissioner Manypenny had reported the "northern limit of the cession extended to 40 degrees 40 mins. north latitude" and insisted it should have such findings, but the Court of Claims denied such motion and held to its findings of fact, as it did to its findings in refusing Appellee any land further west than the tentative "air route" west line given the Omahas by the Manypenny map notwithstanding a full record showing Indians ran boundaries by water courses and that one of their main rivers, the Elkhorn, ran far west of the Manypenny line and west of the confluence of the Niobrara and the Missouri. It is submitted that a special verdict having been rendered that the lands here involved "belonged" to the Omahas the court either should accept that special verdict or require the full record.

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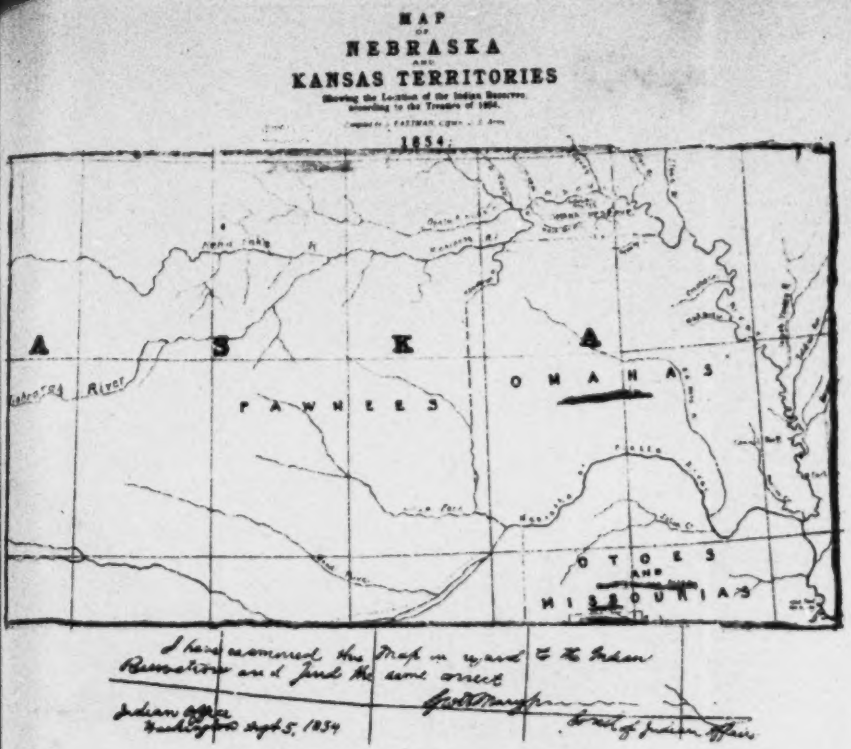
C. J. KAPPLER,
HIRAM CHASE,
Attorneys for Appellee.



Note: The words in the northern or top part of this map immediately beneath the words "Missouri river" are "Omaha Reserve", and the dotted line shows the "Ayoway Creek" line but places the "Niobrar river" 9 miles too far south.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANTS,
v.
THE OMAHA TRIBE OF INDIANS. } No. 243.

THE OMAHA TRIBE OF INDIANS,
v.
THE UNITED STATES. } No. 244.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal and cross appeal from a judgment of the Court of Claims.

The suit arose under and by virtue of the act of Congress of June 22, 1910 (36 Stats., 580), set forth in Finding I (R., p. 15), granting to the Court of Claims jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States * * * under the treaty between the United States and the said tribe of Indians, ratified and affirmed March 16, 1854, or

under any other treaties or laws, or for misappropriation of any funds of said tribe not for its material benefit, or for failure of the United States to pay said tribe any money due."

On June 10, 1918, the Court of Claims awarded judgment in favor of the tribe in the aggregate sum of $122,295.31 upon five separate items as set forth in Findings III, V, VII, VIII, and IX (R. pp. 16–18). From this judgment the United States appealed on July 12, 1918.

The principal reason for the Government's appeal lay in the award to the tribe for the value of the excess land "north of said due west line" (Finding III), it having been contended in the court below that the Omaha Tribe owned none of said land. Finding III does not set forth the facts as the United States view them with respect to this question of the possessor of the Indian title to this land "north of said due west line," and a motion was therefore made for an order remanding the case to the Court of Claims with directions to make findings on the question. This motion was overruled by the court on March 2, 1920, and the Government is therefore not in a position to contest the correctness of the judgment upon this item, except in the event that this court should allow the motion of the appellant in case No. 244 and direct the Court of Claims to certify the whole record to this court. If that motion should be allowed, the Government desires to present this question to the court, as it is convinced that the record abundantly shows that the Indian title

to the tract in question at the time of the treaty of 1854 was in the Ponca Tribe.

The other grounds for appeal are to be found in the action of the court in awarding judgment in favor of the tribe upon the facts set forth in Findings V, VIII, and IX.

FINDING V (R. p. 17).

It is submitted that the court below erred in two respects in awarding judgment upon the facts set forth in this finding:

First, by Article VII of the treaty of 1854 the United States agreed to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." It is, of course, to be presumed that the President knew and performed his duty under the treaty. The finding states that "no protection of any kind was afforded the Omahas by the United States," which means, of course, that the President did not "deem" any protection necessary. Whether or not the President was wrong in his conclusion is beside the question. It was purely a matter of discretion; and the manner of its exercise by the person in whom it was lodged can not be brought into question.

Second, assuming that the furnishing of protection was not discretionary with the President, the Government contends that there was no liability on its part under the treaty to respond in damages for the failure to protect the Omahas. If there was no liability under the treaty, the jurisdictional statute

created none. (*United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 500.) The court, therefore, erred in awarding judgment on this account.

Article 7 of the treaty, it is true, contains a promise from the United States to protect the Indians, but it is not a promise at the same time to pay for the damages which might result from failure to protect. In this aspect the case is similar to that of *Leighton* v. *The United States*. (161 U. S. 291.) In that case, in the treaty between the United States and the Ogalalla Band of Sioux Indians which was under consideration by the court, the Indians bound and obligated "themselves individually and collectively" to "cease all hostilities against the persons and property" of citizens of the United States; but they did not at the same time obligate themselves to pay for the damages which might ensue if they did not keep the peace. Construing this promise to keep the peace, this court said:

> Now, if this treaty was not entirely superseded by hostilities which actually existed between the Ogallalla Indians and the United States, as is undoubtedly the rule when war arises between absolutely independent nations, it still is far from a promise on the part of the Indians to pay for damages caused during any such hostilities. While a breach of a contract similar to this between individuals might very likely give rise to an action for damages, yet no such rule can be enforced in reference to obligations created by a treaty.

> It is a promise on the part of the tribe to keep the peace, and not a promise to pay if the peace is not kept. Especially should this be the construction in view of the fact that many of the treaties between the United States and Indian tribes contain not only a promise to abstain from hostilities, but also a specific stipulation that, in case of a breach of such promise, compensation shall be made out of the tribal funds, or otherwise. The absence of any such express provision in this treaty, the Indians being under the care of the United States and its wards, renders it improper to hold that by its terms the tribe had bound itself to pay for all damages which it might cause during a period of actual hostilities. (Id. 296.)

If a promise in a treaty by an Indian tribe to do or not to do certain things does not carry with it an obligation to pay the damages resulting from its breach, *unless such a liability is expressly stipulated for in the treaty*, it is difficult to see why such an obligation should be imposed upon the United States for its failure to keep a promise of the same character, in the absence of an express stipulation.

As pointed out in the quotation above, the court's decision was strengthened by the fact that many treaties of the kind there under consideration contained a specific promise to pay. In the great majority of instances where the United States by treaties with numerous Indian tribes, covering a period from 1798 to 1868, promised to protect the Indian parties thereto from aggressions either by its

own citizens or by Indians of other tribes, there was also a specific promise to indemnify the Indians for losses of property resulting from such aggressions. (See 7 Stats., pp. 62, 84, 176, 244, 247, 250, 252, 255, 257, 259, 261, 264, 266, 277, 279, 282, 286, 450, 474, 533; 10 Stats., pp. 1013, 1018, 1027; 11 Stats., pp. 611, 699; 13 Stats., p. 673; 14 Stats., pp. 683, 703, 717, 755, 785, 799; 15 Stats., pp. 581, 593, 619, 635, 649, 665, 667, 673.) Such a course indicates, as intimated by this court, a settled policy on the part of the United States not to respond in damages for a breach of a promise of this sort unless there be also a specific stipulation to that effect.

FINDING VIII (R. p. 18).

Under Article II of the treaty of 1865 (14 Stats. 667) the United States agreed to pay to the Omahas $50,000, to be expended "for goods, provisions, cattle, horses," etc.; and Finding VIII shows the facts with reference to the expenditure of a part of this sum for cattle. The finding states that *when the cattle reached the reservation* they were in bad condition, etc. It can, therefore, be assumed that the cattle *when purchased* were in good condition and that their defective condition when they reached the reservation was due to the rigors and hardships of the drive from the market to the reservation. The article of the treaty referred to did not make the United States insurers of the cattle, did not stipulate that sound cattle should be delivered to the Indians at the reservation. The utmost duty that the article imposed upon the United

States was to purchase cattle in the market and deliver them on the reservation, exercising over the cattle during the drive from the market to the reservation only a proper and reasonable degree of care. There is nothing in the finding to show that the United States failed in its duty in this respect. The finding simply states that *when the cattle reached the reservation* they were in bad condition. But what caused that "bad condition" the finding does not show. Unless that condition was due to the fault or neglect of the agents of the United States in caring for the cattle during the drive, the loss must be borne by the Indians.

FINDING IX (R. p. 18).

Article 4 of the treaty of 1854 (10 Stats. 1043) provides that in the discretion of the President part of the money consideration may be expended for—

> their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, etc.; for clothing, provisions, and merchandise; for iron, steel, arms, and ammunition; for mechanics and tools; and for medical purposes.

Article 2 of the treaty of 1865 (14 Stats. 667) provides for the expenditure of $50,000—

> for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up land, and other improvements on their reservation.

Finding IX shows that the United States in 1875 erected an infirmary on the Omaha and Winnebago consolidated reservation, part of the cost of which was paid out of Omaha funds. The finding states further that—

> It was not such a building as was contemplated by the treaties between the United States and the Omaha Tribe of Indians.

If there was any authority for the expenditure of Omaha funds for this hospital, it is to be found in the articles from the treaties quoted above. These treaties are a part of the record before this court, and it can, therefore, very readily and properly decide for itself whether the conclusion of the court below that the hospital "was not such a building as was contemplated by the treaties" is correct. The only limitation upon the construction of buildings which should be read into the treaties is that they must be for the material benefit of the tribe, and it seems obvious that a hospital falls within that category. The court below further finds that the building was not used. Whether the court means to infer by that that if the tribe had been so unfortunate as to require its use and had used it the conclusion would have been different, does not appear; but it is submitted that its use or nonuse has no bearing on the subject.

Furthermore the use of Omaha funds in paying for the erection of a hospital would seem to be justified by the language quoted above from the treaty of 1854 authorizing the President to expend some of this

money for "such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes."

CROSS APPEAL.

STATEMENT.

At the time of printing this brief, the brief of the appellant tribe on its cross appeal has not been received. However, from the brief filed by the tribe in opposition to the motion of the United States for an order remanding case No. 243 to the Court of Claims for further findings of fact, and from the motion of the appellant tribe in this case for an order on the Court of Claims to certify the whole record to this court, it is to be gathered that in the tribe's opinion the court erred—

1. In not finding that the Omaha Tribe had the Indian title to a larger area of country "north of the said due west line" and in not awarding it judgment for this larger area.

2. In not finding in its favor upon other claims set forth in its petition.

3. In not allowing interest upon the amount found in Finding III as the value of the land owned by it "north of the said due west line."

ARGUMENT ON CROSS APPEAL.

Interest.

The only one of these three matters which is properly before the court on this cross appeal is the last, the failure of the Court of Claims to allow interest;

and as to this the appellant tribe argues in brief that this is an equity suit for an accounting; that the money due it for the lands ceded by it "north of the said due west line" under the treaty of 1854 should have been placed after the treaty in the Treasury of the United States at interest to its credit, and that "the United States having acquired this land in trust for the Omahas and never having paid for same should, as trustee, be required on settled equity principles to account for the same, with interest."

Section 1091 R. S. (Judicial Code, section 177) provides—

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for payment of interest.

Neither the treaty of 1854 (10 Stat. 1043) nor the jurisdictional act of June 22, 1910 (36 Stat. 580), provides for the payment of interest on the purchase money for the lands "north of the said due west line."

In *United States* v. *North Carolina* (136 U. S. 211, 216) this court said:

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has

> been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *In re Gosman*, 17 Ch. D. 771.

And in *Harvey* v. *The United States* (113 U. S. 243, 248) appears the following:

> The only remaining question is as to interest, which the Court of Claims disallowed. We think that, under the ruling in *Tillson* v. *United States*, 100 U. S. 43, interest can not be allowed on either of the items in question. We do not see anything in the special statute, act of August 14, 1876, ch. 279, 19 Stat. 490, which takes the case out of the rule prescribed by Section 1091 of the Revised Statutes.

These cases and this section of the Judicial Code would seem to be conclusive of the question. But the appellant tribe argues that as the special statute of June 22, 1910, expressly provides that the Court of Claims shall have jurisdiction to determine "all claims of whatsoever nature" of the tribe against the United States and that "all legal and equitable claims" by either party against the other shall be finally determined, and that as this is an equity suit for an accounting, it is entitled to interest on the said principal sum. Both the *Harvey* and the *Tillson* cases above referred to arose under special acts of Congress equally as broad in their scope as the act in this case. In the *Tillson* case the Court of Claims was directed to "adjudge the amount equitably due

said firm" and in the *Harvey* case to "proceed in the adjustment of the accounts between the said claimants and the United States as a court of equity jurisdiction" and to render judgment in accordance with "the rules and principles of equity jurisprudence." Notwithstanding the language of these two acts this court declared that no interest could be allowed the respective claimants on their claims.

THE ERROR BY THE COURT OF CLAIMS IN NOT ALLOWING FOR MORE LAND IN FINDING III.

This question is not before the court on the present record, as the facts found by the Court of Claims do not disclose any error in this respect. It depends for its solution upon the allowance of the motion made by the appellant tribe and upon an examination of the record which was before the Court of Claims.

If this motion is allowed and the whole record certified to this court, the Government insists that the Court of Claims erred, not in failing to find that the Omaha Tribe owned a greater number of acres "north of the said due west line," but in finding that that tribe owned even the 783,365 acres stated in the finding, as the controlling evidence in the case shows that the tribe owned no land "north of the said due west line" or at most only such area as lay between that line and parallel 42°, 40′, north latitude. This latter area has been computed by the Interior Department to include a total of 327,680 acres. Consequently the tribe is entitled to nothing on this item of their claim, or at most to a judgment for the value

of the difference between 327,680 acres and 300,000 acres at 19.6 cents per acre or $5,425.28 instead of $94,739.54 allowed by the Court of Claims.

By Article I of the treaty of 1854, set out in full in Finding II (R., p. 16) the United States agreed upon the happening of a certain contingency, which did come to pass, that it would pay the tribe for all land "north of the said due west line" belonging to them, less 300,000 acres. What were the eastern, western, and northern boundaries of this cession the treaty does not disclose. As far as that instrument is concerned the northern boundary might have been as far north as the Canadian line. Even the findings of the court below fail to state these boundaries, but evidently the court adopted the Missouri River as the eastern and northern boundary and the eastern boundary of the Pawnee country as the western boundary of this cession. How the court arrived at the stated number of acres the appellees do not know.

The treaty itself being silent on the point, it is necessary to go outside of that instrument for a definition of the tract.

In its opinion the court below holds (R., p. 19):

> *At the time the treaty was made* the United States recognized the Omahas as having title to this land north of the said due-west line, and specifically promised to pay for it. (Italics ours.)

And holds further that "the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right

to make a cession to it" (Id.). If the premise upon which this latter statement is based had been true, i. e., that the United States *at the time the treaty was made* recognized the Omahas as having title to the tract in question, then the decision of the court, in line with such cases as *Fellows* v. *Blacksmith et al.* (19 How. 366, 372), and *Worcester* v. *Georgia* (6 Pet. 515, 583), would no doubt be correct.

But what is the basis for the court's statement that the United States *at the time the treaty was made* recognized the title as being in the Omahas? As pointed out just above, such recognition can not be found in the treaty itself, for that instrument is silent on the point. There is nothing else in the record to show to what extent of country north of this line the United States *at the time of the treaty* recognized the Omahas as possessing the title.

There being nothing in the treaty delimiting this area and there being nothing in the record to show the extent of the recognition on the part of the United States *at the time of the treaty*, the Government submits that it is not estopped from showing the actual extent of this section and from contesting the extravagant claims of the Omaha Tribe in this regard.

The first recognition, if such it can be termed, of the alleged Omaha title to this section is found in the so-called "Eastman" map prepared some months after the treaty and attested by Commissioner of Indian Affairs Manypenny on August 5, 1854, as being correct. This map gives the Missouri River as the eastern and northern boundaries. Why, or upon

what authority, Capt. Eastman did so does not appear. But this map is discredited not only by the subsequent corrections made upon it but by the declaration of the same Commissioner of Indian Affairs who attested its correctness.

Next in point of time is the declaration just above referred to, on November 25, 1854, of Commissioner Manypenny, the official who negotiated the treaty with the tribe, to the effect that during the past season he had concluded treaties with a number of Indian tribes, including the Omahas, under which the Indian title to a vast tract bounded on the east by the States of Missouri and Iowa and "lying between the parallels of 37° and 42° 40′ north latitude" had been extinguished (Rept. Sec. Int. 1854, p. 213). This is the first statement in the record by the official who represented the United States in making the treaty; it is submitted that if any statement with reference to the extent of the Omaha title made *after* the treaty is binding upon the United States it is this. According to the commissioner's statement, the northern boundary of this tract is placed considerably to the south of the Missouri and Niobrara Rivers; and the area included between parallel 42° 40′ north latitude on the north and the due west line on the south amounts, as stated hereinbefore, to 327,680 acres.

Furthermore, the fact that, if the Omahas did not elect to settle in the country "north of the said due west line," they were to receive as a reservation 300,000 acres south of this line seems significant of a

belief on the commissioner's part that the extent of the country north of that line to which they had title amounted approximately to that acreage.

The objection that this parallel is an artificial boundary and not such as would naturally be adopted by Indians, who ordinarily follow watercourses and other natural landmarks in fixing the limits of their territory, is not sound. Many treaties with the Indians in demarcating their country follow lines quite as artificial, and in fact the western boundary of this tract in dispute is also an artificial one.

What happened *after* the treaty, while it may be explanatory of the situation, is not conclusive. The Omahas, of course, could not pass title by the treaty to something which they did not own, and the United States by the treaty simply agreed to purchase such country north of this line as the tribe actually owned. The treaty being silent on this point, the question should be determined, the appellees submit, by contemporaneous and antecedent evidence. According to that evidence the Omaha Tribe prior to the treaty of 1854 never owned or claimed to own any country north of Ayoway Creek. On the contrary, all of this section north of this creek belonged by the Indian title of occupancy and possession to the Ponca Tribe.

It may be here stated that prior to 1854 the Omaha claimed as their northern boundary, not the Missouri River as is apparently assumed by the court, but "the Ponca country." For instance, in 1842 their agent reported that the country claimed by them was

bounded by the Missouri River on the east, by Shell Creek on the west, by the River Platte on the south, and on the north by "the Ponca country" (Rept. Comr. Ind. Affrs., 1842, p. 439); and in 1853, just prior to this treaty, their agent reports that "their country extends from Council Bluffs, on the Missouri River, up to the Puncas, and is immediately in front of the white settlements in the western countries of Iowa" (Rept. Comr. Ind. Affrs., 1853, p. 345). It is significant that if the Omaha country had been bounded on the north by such distinct boundaries as the Missouri and Niobrara Rivers, these rivers were not named as that boundary instead of such an indefinite term as "the Ponca country."

According to the Lewis and Clarke map accompanying the report of that expedition in 1804, the Poncas lived on both sides of the Niobrara River and the Omahas on the Missouri River about the site of their present reservation.

The Nicollet map, published in 1843, places the Omahas south and the Poncas north of parallel 42° 40′ north latitude, one Ponca village being located to the east of the mouth of the Niobrara River and within the disputed tract.

The "Map of the Trans-Mississippi Territory of the United States during the period of the America Fur Trade, 1807 and 1843" places the Omahas in the vicinity of Blackbird Hills, where their present reservation is located, and the "Ponca Post" to the east of the Niobrara at its mouth.

In 1851 Superintendent Mitchell, preparatory to negotiating treaties of peace with various plains tribes, requested Father De Smet, the famous Jesuit missionary and a man possessed possibly of more information with reference to the Indians of this section of the United States and the territory occupied by them than any other man of his time, to make a map demarcating the various tracts claimed by the several tribes. With reference to the map thus prepared Superintendent Mitchell stated that he considered it "one of the most accurate maps of that section of the country yet constructed." The original of this map is now in the Library of Congress. Father De Smet was personally acquainted with the Poncas and visited them in their country in 1847. According to his map the Poncas were located in a section of country including the disputed tract and the Omahas to the south of it.

On pages 377 to 386 of the record in the court below are references to various publications, such as Lewis and Clarke's "Journal," "History of the American Fur Trade of the Far West," Bradbury's "Travels in America," "Travels in America" by Maxmillian, Prince of Wied; "Forty Years a Fur Trader on the Upper Missouri" by Larpenteur—all published or referring to events occuring prior to 1854. The appellees will not refer to these publications in detail but will state that the citations therefrom appearing on these pages show conclusively that the Ponca Tribe roamed over, hunted in, and claimed

the identical tract of country for the value of which the Court of Claims has awarded the Omaha Tribe judgment. This claim, as is shown in the record below, was subsequently recognized by the United States in the treaty of 1858 with the Ponca Tribe (12 Stats. 997).

There is an abundance of other evidence on this question in the record below, consisting of maps and declarations made after the treaty of 1854 and of oral testimony by members of the Ponca and Omaha Tribes, to which the appellees do not further refer here for the reason that they believe that this question should be resolved, as stated, in the light of the contemporaneous and antecedent evidence. That evidence in the appellees' opinion shows that the Indian title to this disputed tract was in the Ponca Tribe.

If, however, this court should conclude that the appellees are estopped from denying that the United States by the treaty recognized the Omaha Tribe as possessing title to *some* land "north of the said due west line," it is then submitted that the extent of that recognition is limited by the first declaration of the United States upon that subject. This, as stated hereinbefore, is found in Commissioner Manypenny's report of November 25, 1854, to the effect that the northern boundary of the Omaha cession was parallel 42° 40′ north latitude. Upon this basis the tribe is entitled to judgment for the value of 27,680 acres and no more.

THE ERROR BY THE COURT OF CLAIMS IN NOT FINDING IN FAVOR OF THE TRIBE UPON OTHER ITEMS IN THIS PETITION.

The appellees are unaware of any error by the Court of Claims in this respect; and as the appellant tribe's position with reference thereto has not as yet been set out, the appellees will be obliged to defer a discussion of this heading until the trial.

CONCLUSION.

In conclusion it is submitted that the Court of Claims erred in awarding judgment to the Omaha Tribe of Indians upon the facts set forth in Findings V, VIII, and IX, and to that extent the judgment of the Court of Claims should be reversed for the reasons above stated. That the Court of Claims did not err in refusing to allow interest upon the amount found as the value of the land "north of the said due west line" and that its judgment in this respect should be affirmed. If the motion of the appellant tribe is allowed, the judgment of the court below should be re-formed in accordance with the argument above made.

Respectfully submitted.

FRANK DAVIS, Jr.,
Assistant Attorney General.

GEO. T. STORMONT,
Attorney.

MARCH, 1920.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

Nos. 243 and 244.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS, APPELLEE,

AND

THE OMAHA TRIBE OF INDIANS, APPELLEE,

vs.

THE UNITED STATES, APPELLEE.

BRIEF OF THE OMAHA TRIBE OF INDIANS.

The foregoing appeals are by the United States and the Omaha Tribe of Indians respectively from a judgment (Trans. Rec., p. 20), rendered by the Court of Claims June 10, 1918, in favor of the Indians for $122,295.31, in a suit by the tribe against the United States (Rec., p. 1), the Court of Claims rejecting a counter-claim in the sum of $58,800 by the United States (p. 13), on which the tribe had joined

issue by replication (p. 14), the United States, pursuant to the provisions of the jurisdictional act, having by its counterclaim alleged the Omahas had sold the United States land which belonged to the Ponca Tribe of Indians (p. 14), which alleged ownership by the Ponca Tribe of Indians the Court of Claims rejected, finding (Finding III, p. 16), after full evidence taken and reviewed, that the land in question, being an area between a line drawn due west from Ayoway Creek, in eastern Nebraska, on the south and the Missouri River on the north "belonged" to the Omahas at the date of the treaty with the Omaha Tribe in March, 1854. The Omahas contend their northern boundary included not only the Missouri River, but a part of the Niobrara River as well.

The appeal of the United States, no assignments of error having yet been furnished counsel for the Omahas, presumably is based on a contention that the Court of Claims erred as "matter of fact" in finding that the land involved in the litigation "belonged" to the Omaha Tribe, the United States having unsuccessfully sought to convince the Court of Claims that the land "belonged" to the Ponca Tribe, and having thereafter by a perversion of the findings of fact of the Court of Claims unsuccessfully endeavored by motion to have this court refer the cause back to the Court of Claims to find that which it already has found as a fact, namely, that the land involved "belonged" to the Omaha Tribe, the United States seeking to contend the finding of the Court of Claims was a finding of law based on the language of the Omaha treaty of 1854, whereas the lower court made a "finding of fact" based on the Omaha and other Indian treaties, government and other maps, records made by earlier and contemporaneous (with the treaty) officials of the United States, historical data, and oral testimony.

The appeal of the Omaha Tribe, conceding, *arguendo*, only the correctness of the findings of fact limiting the Omahas' territorial rights to the area (erroneously stated at 483,365 acres) between the Ayoway Creek line on the south and the

Missouri River on the north, is that the Court of Claims erred in denying the tribe interest on the value of the above land taken over in trust by the United States and never paid for and also erred in denying the tribe interest on some $18,-202.19 (Findings of Fact IV and VII, pp. 17, 18) which the court found should have been expended by the United States for the material benefit of the claimant Indians, but never had been expended for them owing to misappropriation of funds by the United States Indian agents. Also that under the guarantee of protection given them by the United States (Finding V) they were entitled to be paid for tribal members killed and wounded.

The Court of Claims in its original opinion, rendered April 22, 1918 (furnished counsel by the court in pamphlet form and a copy of which counsel now has), allowed the Omahas interest on both the land claim, fixed by the court below at $94,739.54, and on the claims for monies never received though paid to Indian agents of the United States, the Court of Claims in its original opinion, after stating its findings of fact, saying:

> "Conclusion of Law. Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the amount shown in Finding III, to wit, the sum of $94,739.54, with interest at 5 per cent per annum from June 15, 1854; * * * the amount shown in Finding VII, to wit, the sum of $18,202.19, with interest at 5 per cent per annum on $15,068.80, part thereof, from August 3, 1856, and on $3,133.39, the residue thereof, from August 11, 1858."

The Court of Claims judgment followed its Conclusion of Law and read:

> "A judgment will therefore be entered for the sum of $122,295.31, with interest at the rate of 5 per cent per annum on $94,739.54 from June 15, 1854, and

on $15,068.80 from August 3, 1856, and on $3,-133.39 from August 11, 1858. It is so ordered."

The United States moved for a new trial because of the adverse findings of fact and also on the ground that the Court of Claims by the statute of its creation, re-enacted as section 177 of the Judicial Code, was forbidden to allow interest except from the date of its judgment. The lower court summarily denied so much of the motion as related to the Findings of Fact and granted the motion, without argument, as to interest. The claimant Indians moved the Court of Claims to certify the whole record to this court on the ground the cause was an equity cause, entitling them to have the whole record reviewed, and that on the land claim they had been allowed several hundred thousand acres less than their land area north of the Ayoway Creek line, and the price had been erroneously lowered. They also specifically moved the court to have the record show the court's original findings and conclusion and judgment of date April 22, 1918, with the interest provisions, and also claimant's motion of June 10, 1918 (History of Proceedings, p. 15), but the court denied the same.

Claimant Indians have moved this court to certify the whole record for review and this court has postponed action thereon pending hearing on the merits. Claimant Indians press the motion, believing its grant will largely increase their recovery, or, in the alternative, if an undue burden would result to this court, that directions be given the Court of Claims, as hereinafter set forth more at large, to further review the cause.

In view of the fact that the cause is one under a special act of Congress for a general settlement and accounting, to wind up once for all time, as stated in the Congressional report on the bill enacted into law, referring the case to the Court of Claims with the right of appeal to this court (House Report No. 7614, Fifty-ninth Congress, and House Report

No. 1427, Sixtieth Congress), the claims between the tribe and the United States prior to the expiration of the tribal trust-patents period, with jurisdiction to determine "all legal and equitable claims" of the tribe and "any legal or equitable defense, set-off, or counterclaim" of the United States, any judgment rendered to be a "final settlement," claimant Indians contend that they are entitled to a full review of their case unhampered by the general statutory provision limiting the authority of the Court of Claims and prohibiting, in general, allowance of interest by it. The purpose of Congress was not to hold open for the future any claim for interest or anything else, and liberally interpreted, in accordance with the spirit and expressed intendment of the act and the trust relationship of the United States to the land acquired and the Indians, the cause should be decided as would be any cause in equity rather than a case at law encased in restrictive general statutory provisions. The Court of Claims took too limited a view of the act, of the powers of this court under the Constitution, and of the intent of Congress.

The claims are in part of an equitable and trust nature and the cause as a whole involves such an accounting as under general principles of jurisprudence is proper for equity rather than a court of law and a jury. The United States *vs.* Old Settlers, 148 U. S., 427.

As the claims are separate and distinct, counsel hereafter will state the facts and law applicable to each under the findings of fact below, after making an assignment of errors as required by the rules, and in conclusion will treat of the matter reserved by the ruling of this court on the motion of claimant Indians that the whole record be certified.

Assignment of Errors.

The Omaha Tribe of Indians, appellant in No. 244 and appellee in No. 243, for cause of appeal state that the court below erred as follows:

1. In that it failed to allow in its final judgment interest on the sum of $94,739.54 found by it to be due claimant Indians for lands acquired by the United States under the treaty of March 16, 1854, and never accounted for.

2. In that it failed to find the United States acquired the lands north of Ayoway Creek from claimant Indians with a trust thereupon and should account therefor for the minimum amount received on sale of said lands, namely, $1.25 an acre.

3. In that it failed to allow in its final judgment interest on the sum of $18,202.19 which it found to be a balance unexpended by the United States of the $41,000 the United States agreed to expend for the benefit of the Omaha Tribe of Indians under article 5 of the treaty of March 16, 1854 (findings 4 and 7).

4. In that it refused and failed to certify the whole record in the cause to this court.

5. In that in fixing the area of lands for which the United States should account it adopted as the western boundary line of the Omaha lands under the treaty of 1854 a due north and south line drawn from the junction or confluence of the Niobrara River with the Missouri River, as shown on the map drafted by Eastman and signed by Indian Commissioner Manypenny in August, 1854, notwithstanding Commissioner Manypenny's written official statement in 1856 that said western line had been drawn only provisionally or tentatively pending a more accurate delimitation of the boundary line between the Omahas on the west and the Pawnees on the east and that by the Pawnee treaty of September 24, 1857 (11 Stat., 729; 2 Kappler Indian Laws and Treaties, Art. 1), both the Pawnee Tribe and the United States acknowledged that the Pawnee eastern boundary line did not extend as far east as the junction or confluence of the

Niobrara River and the Missouri River, but was west of said confluence on the Niobrara River before the Niobrara, flowing west to east, had yet reached the Missouri River.

6. In not finding that the Omaha-Pawnee boundary line was not a mathematical longitudinal due north and south line, but was a line that followed streams from where their mouth was in the Platte River, which was the common southern boundary line of each of the tribes, and ran with the course of the stream in a northwesterly direction, the boundary line in the Platte being either Shell Creek or Beaver Creek (this being a point of contention between the two tribes) and then when these streams near their headwaters ran close to streams flowing north into the Elkhorn (the principal stream of the Omahas and along whose banks they had villages since the memory of man runneth not to the contrary), followed the Elkhorn northwesterly to the sand hills where the buffalo abounded beyond the town of O'Neill, Nebraska, and thence north through the unwatered sand hills to a point, not then surveyed, on the Niobrara River, as shown by the Pawnee treaty, and thereafter going east by the Niobrara and Missouri Rivers to the Platte River as the southeastern boundary point, the lands north of a due west Ayoway Creek line so drawn aggregating 1,300,000 acres as found by the General Land Office.

7. In finding the area within the lines as shown on the Manypenny map by following the errors as to latitude made by Manypenny in the absence of surveys as to the location of Ayoway Creek, the Missouri River to the north and the confluence of the Niobara and the Missouri Rivers at the northwest and a west line drawn therefrom and adopting the General Land Office calculations of the areas as so shown of 783,365 acres north of Ayoway Creek and approximately 4,500,000 acres as the total Omaha area while refusing to accept the General Land Office price on the basis of such acreage of 25 cents per acre as the price due, if the United

States were liable (Report of Assistant Commissioner Proudfit, of General Land Office, of July 15, 1911, Original Record, pp. 297-98, and instead, while retaining the above excess acreage of 483,365 acres, adopting the acreage price of 19.6 per acre fixed in a filed report sent to the Attorney General by Assistant Secretary of the Interior Vogelsang November 9, 1917, at the request of counsel for the United States, stating that on the Eastman (Manypenny) map (Record, p. 484*a*), "the mouth of Ayoway Creek (Rec., p. 484*c*) is placed 2½ miles *too far north;* the Missouri River at Yankton 3¼ miles *too far south;* the Niobrara River at the mouth of Mauvaises (the present Verdigris, which is about the junction of the Niobrara and Missouri) River 9 miles *too far south,* and the distance *east and west* from the mouth of Ayoway Creek to the mouth of Mauvaises River 18¾ miles *too short,*" the true acreage north of Ayoway Creek within these boundaries and ceded but not paid for to claimant as shown by an official report by Assistant Secretary Sweeney of October 4, 1916, from the official surveys being 1,120,000 acres, so that the court should adopt either 820,000 acres at 19.6 cents as the amount to be paid for or 483,365 acres at 25 cents, but not each time adopt figures most adverse to claimant.

8. In denying relief to claimant for members of the tribe killed or wounded and property destroyed by a failure of the United States to fulfil its treaty obligation guaranteeing protection and allowing claimant only for horses (finding 5), notwithstanding the duty of the court to fix damages for injuries unlawfully sustained and that the Record shows the United States not many years prior to the treaty had approved an agreement between tribes living in northern Kansas or southern Nebraska that either tribe should pay the other $1,000 for each tribal member killed by members of the other tribe.

ARGUMENT.

CLAIM 1.

This claim is for land north of Ayoway Creek acquired by the United States by Article I of the Omaha treaty of March 6, 1854 (Findings 2 and 3, p. 16), whereby the United States unsuccessfully sought to induce the Omahas to act as a buffer between the warlike Sioux and Poncas north of the Missouri, and the settlers it was proposing to let into the more fertile and removed lands owned by the Omahas south of Ayoway Creek. The United States, pursuant to a general act of Congress, at the period in question, contemplating fixed Indian reservations, made land treaties with a number of tribes for the purpose of providing for the settlers who were crowding into the Missouri, Platte, and Kaw river regions. The northern Sioux barrier, west of Minnesota, had not yet given way.

The United States, for a total consideration of $881,000, agreed by the treaty aforesaid to acquire from the Omahas all their lands south of a line drawn due west from where Ayoway Creek empties into the Missouri River, which river formed the eastern boundary of Nebraska Territory. At that time all Nebraska north of the Platte River and south of the Missouri River on the east and the Missouri and Niobrara rivers on the north was occupied and claimed under the usual Indian title, and with such recognition as had come from prior treaties with them limiting their area to within these boundaries, by two titles, the Omahas and Pawnees, both inclined to become less warlike and both in fear of the more powerful Sioux, who lived north of Nebraska and under pressure from the whites were overrunning the extreme northwestern and western part of Nebraska and were in alliance with the equally powerful and warlike Arapahoe and Cheyenne Tribes who pressed the Pawnees from far western Nebraska. The buffalo ranged the sand hills of north, central, and western Nebraska and made the standard meat, raiment, and shelter of all the tribes mentioned.

The absence of any prominent water course or other natural boundary to mark the entire distance from the Platte River on the south to the Niobrara River on the north, prevented any clear line of recognized boundary between the Pawnees on the west and the Omahas on the east. By common consent and a common dread of their enemies the Pawnees and the Omahas refrained from mutual hostilities and were joined in a common cause of self-protection, each claiming, but without hostility, a certain intermediate area between boundaries or streams that each recognized as belonging to the other. Thus the large Elkhorn River was conceded to be Omaha territory, as it ran through territory villaged and hunted in by the Omahas for years, and west of the large, wide Loup Fork of the Platte was conceded to be Pawnee territory, either tribe when desiring to make a large hunt embracing the other's conceded territory requesting (and receiving, at least in later years) permission.

The intermediate and unconceded territory near the Platte on the south was to be determined by whether the Omaha boundary along the Platte River ran to Shell Creek only or ran further westward to where Beaver Creek flowed into the Loup Fork of the Platte River, the Omahas insisting and the United States apparently supporting its claim to the land as far as Beaver Creek, while the Pawness fixed the line further east, at Shell Creek. Each tribe pursued the normal course and followed a stream belonging to it northwesterly to near its headwaters and recognized that, whichever stream was the true line, the Omaha boundary then followed that stream northwestward to near its headwaters and thence creeks flowing northward into the Elkhorn and proceeded northwestward with the Elkhorn to the sand hills of Holt County, where the buffalo ranged, and thence tnrough the sand hills by a short unmarked line to the natural water course on the north, the Niobrara River, where the Omahas turned east and the Pawnees west.

When the United States came to make its treaty with the

Omahas in 1854 its representative avoided any dispute over the line between the Pawnees and Omahas, as their respective treaties show. The Omahas were urged to locate permanently north of Ayoway Creek. The Yankton Sioux then would have been their neighbors across the Missouri River on the north. The Omahas, from fear, objected, but finally yielded to an article so drawn as to relinquish, with qualification, however, all right and title to the country south of a line drawn from Ayoway Creek, due west to their, the Omahas' western boundary line, the land north to be their future reservation home. It was not deemed necessary to make a northern boundary, because the Missouri and Niobrara rivers were the recognized and natural boundary. A proviso, however, was inserted at the Indians' instance whereby they were given the right in lieu of the large reservation north of Ayoway Creek, if they insisted, to take a smaller reservation of 300,000 acres south of Ayoway Creek, in which event it was provided "then and in that case, all of the country belonging to the said Indians north of said due west line shall be and is hereby ceded to the United States by said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

The treaty on its face shows that both parties recognized there was a materially greater area of land north of the Ayoway Creek line than 300,000 acres. It is now conceded the Omahas never have been paid for the excess. What their recovery in dollars and cents shall be obviously depends on how much land was north of the line, to be paid for, and also how much land was south of the line, so as to fix the acre price (though the Indians insist under all the circumstances they should be paid $1.25 per acre, the price to settlers).

A determination of the land area obviously and necessarily depends on where was the western Omaha boundary line. The Court of Claims, as both parties to the controversy

from motions already filed in this court admit, took the western line and accepted calculations based thereon, by adopting as the western boundary a north and south line drawn due south from the confluence of the Niobrara and Missouri rivers. (See United States motion to remand the cause, page 5, last paragraph.) It did this on the theory that the Omahas and not the Poncas owned north of Ayoway Creek and of acknowledgment by the United States that the line ran at least as far west as the confluence of the Missouri and the Niobrara, inasmuch as the commissioner negotiating the treaty on the part of the United States, Mr. George W. Manypenny, then Commissioner of Indian Affairs, in August, 1854, had approved a map made by Captain Eastman of the United States Army on which was located the new Omaha Indian reservation (proposed since the Indians refused to take and elected a small 300,000-acre reservation south of the Ayoway Creek line instead), the said reservation being shown as beginning in the southeast at the mouth of Ayoway Creek in the Missouri River and thence following the Missouri north and then west to its confluence with the Niobrara River, thence by a due north and south line to a point where a due straight line from west to east would bring the boundary line to a place of beginning.

That the Court of Claims erred as to claimant Indians' rights to have its true western boundary line judicially determined (however much the United States may be limited from asserting the line was farther east by this endorsed map of its negotiator and Indian Commissioner), treating said map only as one piece of evidence and not as concluding the subject as did the court below, would seem to be clear inasmuch as it took two parties to make a treaty (this being prior to the statute of 1871 abolishing Indian treaties and at a time when this court held an Indian treaty to be a contract of mutual consent, Michel *vs.* U. S., 9 Peters, 746; Choctaw Nation *vs.* U. S., 119 U. S., 1-39) to be interpreted in case of

doubt most favorably to the Indians. Minnesota *vs.* Hitchcock, 185 U. S., 396.

Manypenny and the Indian Office, However, Acknowledged the 1854 Map Was Not Final.

But, though the United States is bound by the Manypenny map to the extent that it cannot deny the Omaha title extended from the Ayoway Creek line north to the Missouri River and excluded any defense based on the counterclaim alleging the land *belonged* to the Poncas and not to the Omahas and westward as far as the confluence of the Niobrara and Missouri rivers (see Manypenny map reproduced at the end of this brief), even if it were true that a definite and final decision by the United States that the lands it was acquiring from the Omahas by the treaty of 1854 extended westward only as far as a line drawn south from the confluence of the Niobrara and Missouri rivers, the fact is that *Commissioner Manypenny himself did not treat this map of 1854 as definite and final, but merely as provisional and tentative.* He considered it simply as establishing a west line to which the Omaha reserve unquestionably would extend if the Omaha Tribe's reluctance to settle north of Ayoway Creek could be overcome, and if not as establishing a west line and an area that could be safely considered as open to public settlement as newly acquired public lands, leaving for future and more accurate determination the question how much further westward the Omaha western boundary ran before meeting the Pawnee eastern boundary.

This is conclusively shown by an official letter which this court may consider under the authority of the case of New York Indians, 170 U. S., 1 (and in the record below at page 478), written by George W. Manypenny, Commissioner, advising a proper settler as follows under date of the Department of the Interior, *July 7, 1856:*

> "The title to the country lying north of said first-mentioned line became, therefore, by such new assignment (that of the Omahas to a 300,000-acre reservation south of Ayoway Creek), vested in the United States, and the lands subject to all the laws affecting the settlement and sale of the public lands in Nebraska territory.
>
> *"The western boundary of what was the Omaha country has not been definitely settled."*

That the United States, however, recognized that the western boundary was *west* of the confluence of the Niobrara and Missouri rivers and at some as yet unascertained and unsurveyed point on the Niobrara River is conclusively shown by the treaty, which may be judicially noticed, between the United States and the Pawnee Tribe of Indians negotiated by Indian Commissioner Denver, September 24, 1857 (11 Stats., 729; 2 Kappler, 764), which by article 1 acquired from the Pawnees all their lands bounded as follows:

> *"On the east by the lands lately purchased by the United States from the Omahas;* on the south by lands heretofore ceded by the Pawnees to the United States; on the west by a line running due north from the junction of the North with the South Fork of the Platte River, to the Keya-Paha River; *and on the north by the Keya-Paha River to its junction with the Niobrara, L'eau qui Court, or Running-Water River, and thence, by that river, to the western boundary of the late Omaha cession.* Out of this cession the Pawnees reserve a tract of country, thirty miles long from east to west, by fifteen miles wide from north to south, including both banks of the Loup Fork of the Platte River; *the east line of which shall be at a point not further east than the mouth of Beaver Creek.* If, however, the Pawnees in conjunction with the United States agent, shall be able to find a more suitable locality for their future homes, within said cession, then they are to have the privilege of selecting an equal quantity of land there, in lieu of the reservation herein designated, all of which shall be done as soon as practicable."

This evidences absolutely that the *northwestern* boundary line of the Omahas was at a point on the Niobrara River west of and not at the confluence of the Niobrara and Missouri rivers as shown on the Manypenny tentative map of 1854 and was so acknowledged by the United States and that the *southwestern* boundary of the Omahas ran to the *mouth of Beaver Creek*, which creek lies, as shown on the map attached to this brief and reproduced from the printed official map of the State of Nebraska of 1908 in the General Land Office, throughout its entire course *west* of the confluence of the Niobrara and Missouri rivers and runs northwesterly. The Omaha Indians traversed it as their boundary to near its headwaters under the necessity of keeping near wood and water and then from the headwaters marched to streams entering the Elkhorn and thence northwesterly by the Elkhorn to the sand hills near the headwaters of the Elkhorn and thence by march to the Niobrara—the divisional point on which, as both Omaha and Pawnees treaties show, is not stated in either treaty (probably for lack of surveys), but obviously was west of the town of Oneill as testified orally and miles beyond the confluence of the Niobrara and the Missouri.

That the Pawnees recognized and acknowledged the United States had found and conceded the Omaha southwestern boundary to extend to Beaver Creek is shown in the annual report of the Commissioner of Indian Affairs for 1856 (p. 106), which the court, on the authority of The New York Indians, 170 U. S., 1, may judicially notice, which incorporates the following report to the Indian Office by Samuel Allis, Pawnee official interpreter:

"The land *the whites are settling on* near the Pawnees has been bought of the Otoes and Omahas; but the Pawnees complain of the Omahas having sold land to the Government which belongs to them, which I am satisfied is true; I have been 23 years in the country and I have always understood that Shell Creek was the dividing line between them and the Omahas, and the Omahas sold to Beaver Creek,

which is a difference of forty miles up the Platte, and this is a great cause of dissatisfaction with the Pawnees"—the report concluding with a recommendation to make a treaty with the Pawnees.

It is submitted that this court either should examine and fix the boundaries from the whole record and the area within the same north of Ayoway Creek, and also south of that creek, so as to determine the price, or should give to the Court of Claims such appropriate directions as will result in the court below ascertaining the correct boundary lines as shown by stream courses and not accepting as conclusive the Manypenny longitudinal straight western line and its errors as to locations and distances as controlling the areas to be found.

Thus the court below, accepting the Manypenny map as conclusive, adopted the area of 783,365 acres as north of that line as reported by the General Land Office (Original Record, p. 297) from the map in Royce's Indian Land Cessions (taken from the Manypenny map) and following its errors as to locations and distances, notwithstanding the Assistant Secretary of the Interior, in response to claimant's call under date of November 14, 1916, reported that taking the lines and streams shown on the Manypenny map north of Ayoway Creek, the Mauvaises Terres River being the present Verdigris River, which flows into the Niobrara at or near its confluence with the Missouri, the area north of the Ayoway due west line to the Missouri was 1,120,000 acres, or a true excess above the 300,000 acres allotted to the Omahas of 820,000 acres, the Interior Department's report stating:

> "The area of the Omaha reservation, taking a line running due west from Ayoway Creek to Mauvaises Terres River, and thence down said stream, and the Niobrara and Missouri Rivers to the mouth of Ayoway Creek, according to said map of 1854, as the boundaries, it is approximately 1,750 square miles, or 1,120,000 acres, using the boundaries of said

Omaha reservation indicated on the map as above set out, the area is approximately 9,825 square miles or 6,288,000 acres."

And this error of treating the Manypenny distances and longitudes as conclusive, regardless of the fact that the official surveys of Nebraska, later made, established Mr. Manypenny's mathematical inaccuracies on the basis of the streams he had recognized as boundary lines, was followed, although, in response to an informal request of the attorney for the United States, the Department of the Interior, on November 9, 1917, reported to the Attorney General as follows (Original Rec., p. 484C):

"At Mr. Anderson's request examination has been made of said map of Eastman (approved by Manypenny in August, 1854) with reference to its accuracy so far as the lands in dispute are concerned. On the Eastman map the mouth of Ayoway Creek is 39½ miles north of the 42d parallel of north latitude, while, according to the General Land Office map of the State of Nebraska for 1908, the distance is 37 miles, a difference of 2½ miles. The Missouri River, near the city of Yankton, is 56 miles distant from said 42d parallel, according to the Eastman map, and 59¼ miles, according to the State map mentioned, a difference of 3¼ miles. The Niobrara River, at the mouth of Mauvaises River, is 39 miles distant from said 42d parallel, according to the Eastman map, and 48 miles according to the State map mentioned, a difference of 9 miles. Taking an east and west line from the mouth of Ayoway Creek to the mouth of Mauvaises River, the distance on the Eastman map is 53¾ miles, and on the State map, from the mouth of Ayoway Creek to a line due south of the mouth of said Mauvaises River, now called Verdigris River, the distance is 72½ miles.

"Accordingly, it appears that on the Eastman map, the mouth of Ayoway Creek is placed 2¼ miles *too far north;* the Missouri River at Yankton, 3¼ miles *too far south;* the Niobrara River, at the mouth of

> Mauvaises River, 9 miles *too far south*, and the distance east and west from the mouth of Ayoway Creek to the mouth of Mauvaises river 18¾ miles *too short*."

The Court of Claims, however, while following the Eastman-Manypenny erroneous distances and allowing claimant only 483,365 acres instead of 820,000 acres, still further cut down the claim by refusing the price of 25 cents an acre reported on the basis of the Eastman-Manypenny errors as to distances and allowed only 19.6 per acre on the basis of the later calculations based on the State-map distances. Obviously, this was without justification in any view that can be taken.

On the basis of the Beaver Creek line the acreage would be 1,300,000 acres or an excess of 1,000,000 acres.

It may, however, be claimed that this court must accept the findings of the Court of Claims as conclusive and in the nature of a special verdict of a jury, U. S. *vs.* Smith, 94 U. S., 214. Further, that this court cannot say from Finding III what lines the Court of Claims adopted as the boundary of the Omahas north north of Ayoway Creek. It is submitted that counsel for both claimant and the United States in motions heretofore filed agree that the Manypenny map was regarded by the court below, and moreover that this court is entitled to know and have findings as to the boundaries adopted for the Omaha provisional reserve north of the Ayoway Creek line, and, moreover, that it is entitled to take the Pawnee and Omaha treaties both together and on their basis have appropriate findings made. This, aside from its right under United States *vs.* Old Settlers, *supra*, to review the whole Record.

Before closing this branch of the case counsel for claimant to anticipate a possible point that the United States may raise as to the Omaha treaty showing on its face, by providing for an exploration, that the area north of Ayoway Creek did not belong to the Omaha, will state that the United States

attempted a defense below by means of inserting in the record below an affidavit made by one Griffy, claiming to have been employed by the agent for the exploratory trip, in December, 1855, that Logan Fontanelle, principal chief of the Omahas, when Ayoway Creek was reached remarked that it was useless to cross the creek (Orig. Rec., 286) "as he knew the country well, and that he, as the principal chief and business agent of the Omahas, refused to accept it," and would take no other place than their present 300,000-acre reservation at Blackbird Hills, and that both Fontanelle and the agent made the trip, but merely, they stated, to fulfill instructions from the President—this affidavit, showing on its face, it was made to aid a "sooner," who had staked a claim on Blackbird Hills before it was settled, what lands the Omahas would take as others did as "sooners" with reference to the Ayoway Creek country.

With reference to so much as may be made of a contention, advanced below, that the United States should not be bound by the Manypenny map and its acknowledgment that the land between Ayoway Creek and the Missouri River belonged to the Omahas and not to the Poncas, it is submitted that on this point the case, if necessary, could be submitted on the authority of The United States *vs.* Brooks, 10 Howard, 442-59, wherein the court approved this instruction:

> "That the United States, by treating with the Caddo Indians for the purchase of their lands, recognized in said Indians a right to said lands, similar to the rights to lands generally recognized in Indian Tribes with whom the United States have made treaties."

Claimant, however, did not so rest but by means of the Nicollet-Fremont map of 1840, Morse's map of Nebraska Territory of 1856, historical data, official government reports and oral testimony established clearly the Omaha Tribe as exclusively entitled to eastern Nebraska to the Pawnee line and that the Poncas *belonged* north of the Missouri and the

Niobrara. The attempt to introduce the Poncas by means of a counter-claim was only adopted after it was seen that a claim in behalf of the Otoes and Missourias, living *south of the Platte* would not aid the United States, the jurisdictional act at the request of the Indian office having given the Otoes and Missourias leave to intervene in the case but nothing coming of it, as nothing did come in evidence of the contention advanced to the committee of Congress, which heard the Omaha Tribesmen personally and in response to their earnest insistence for 40 years for payment sent the case to court for final judicial settlement, notwithstanding the Indian office said that while the treaty article on its face would show support for the Indians claim their treaty rights had been ignored and promises of payment not kept, the matter had "been covered by some general settlement or course of dealing between the Government and said Indians" (House of Reps., Report No. 1427, 60th Congress).

INTEREST SHOULD BE ALLOWED ON THE LAND CLAIM.

The Court of Claims as heretofore shown originally allowed interest at 5 per cent on the amount found by it to be due under the Ayoway Creek land claim and then on motion of the Government counsel without argument eliminated it from its conclusion of law and its judgment.

The action of the court was based on the following provision of the act of March 3, 1863, creating the Court of Claims, carried into the Revised Statutes as section 1091 and into the Judicial Code as section 177:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for payment of interest."

It apparently is conceded that but for this statute interest would be allowed. The Omaha Tribe respectfully submits

to this court that this statute does not constitute a bar in this case and that under the terms of the jurisdictional act this case comes within the principles of equity where interest is usually allowed, notwithstanding that a common law interest is not allowed and within principles applied by this court in other cases where it has allowed interest notwithstanding the statute just quoted:

By the jurisdictional act the Omaha Tribe was granted the right to sue the United States on "all claims of whatsoever nature" for determination of the amount "due" the tribe under the treaty of 1854 or other laws or treaties, or for "misappropriation of tribal funds," or "for failure of the United States to pay said tribe any money due. The court was authorized to determine "all legal and equitable claims, if any, of said Omaha Tribe of Indians against the United States, and also any legal or equitable defense, set off, or counter-claim which the United States may have against said tribe, and to enter judgment thereon." The act further conferred "authority to settle the rights, both legal and equitable," of both parties regardless of statutory limitations and provided judgment and satisfaction should be "a full settlement" of all tribal claims.

In other words, the purpose of the act plainly was to have a final accounting and final settlement, and not to leave open for the future a claim to interest. What is within the plain intendment and purpose of an act is as much within its provisions as though directly expressed. It clearly was not the intention of Congress to impose interest or other restrictions on judicial accomplishment of full and complete justice under legal and equitable principles.

The United States occupies a relation of trust to the Indians which renders of little value authorities in general cases. As to the Indian tribes the rule is that the United States is, as stated in United States *ex.* Old Settlers or Western Cherokees, 148 U. S., 427, "desirous as the stronger party to the

controversy that that superior justice which looks only to the substance of the right should be done in the premises."

While at the common law interest was not allowed in the absence of a statute, the rule in equity always has been exactly the contrary. By conferring equity jurisdiction Congress conferred the incidents of equity jurisdiction.

> "In equity, interest goes with the principal as the fruit with the tree" (Himely *vs.* Rose, 5 Cranch, 313-19).

Counsel does not overlook Tillson's case, 100 U. S., 43, where the court held that equity jurisdiction was not conferred by reason of the fact that the case was referred to the Court of Claims to determine and adjudge "the amount equitably due" Tillson, the court saying, "To our minds the word 'equitably' means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants"; and it was for this reason it refused to allow Tillson interest.

When the Omaha treaty was made, the only mode whereby the United States could take, lawfully, possession of Indian lands was by consent of the Indians and if consent was given on conditions, fulfillment of those conditions was an essential requisite of the taking (U. S. *vs.* Clark, 9 Peters, 168), and where, as in the Omaha treaty of 1854, the amount remained unascertained and provision was not made as to disposition of the money when the land area and price should be ascertained, such ascertainment within a reasonable time, the creation of a trust in the meantime and credit of the trust funds on the books of the treasury at interest as provided by the general law as to Indian funds was as much a part and incident of the treaty as though expressed therein.

By the treaty of 1854 (10 Stats., 1043) the United States took title to the lands north of Ayoway Creek in trust: 1, to hold it as a home for the Omahas in the event the latter

would agree to accept the reserve as their future home; 2, if the Omahas would not so agree, but elected to live south of Ayoway Creek, then to carve out a reservation of 300,000 acres for the Omahas south of Ayoway Creek, the tract to the north to cease to continue lands of the Omahas upon, but only upon, the United States paying the Omahas for the same, less the 300,000 acres selected south of the Creek (article 1), whereupon the funds to be ascertained became trust funds due and held by the United States as in any other resulting trust.

The payment for the excess acreage north of Ayoway Creek was a condition to the United States acquiring the tract and without payment no acquisition of the same could be made. The condition on the part of each party was concurrent and the title to the United States in the lands can be upheld only on the theory that equity considers as done (Seymour *vs.* Freer, 8 Wall., 202-14) that which it was agreed should be done and that the purchase money was, potentially, in the treasury of the United States and there held, as all other Indian trust funds, for the use and benefit of the Indians and at interest at the fixed rate of 5 per cent per annum.

If this theory, which requires that interest be allowed, be not adopted, then the court is remitted to the doctrine, more disadvantageous still to the United States, that the assumption by the United States of title to the land, *without compliance with the concurrent condition of payment for it to the Indians*, and its sale by the United States to settlers was a breach of trust requiring the United States to account to the Omahas for the moneys realized from such sales, the minimum sale price being $1.25 per acre, or less than the court has allowed, including interest.

The trust relation in which the United States originally stood to this tract in controversy, in other words, once existent could be terminated and the right of full ownership succeed the trust relationship only by payment.

A trust in its technical sense is an obligation on a person

arising out of the confidence reposed in him to apply property faithfully and according to such confidence.

> Weltner *vs.* Thurmond, 98 Pac., 590.
> Macwell *vs.* Wood, 111 N. W., 203-4.
> First State Bank *vs.* Sibley Co. Bank, 96 Minn., 456.
> Allen *vs.* Rees, 8 L. R. A. (N. S.), 1137.

The United States may be trustee and, while it cannot be sued without its sovereign consent, that consent given causes application of the general principles of law and equity.

Perry on Trusts, Sec. 41, says:

> "The United States and each one of the separate States, may sustain the character of trustees. They have legal capacities to take and execute trusts for every purpose. But a court cannot execute its judgments and decrees against a sovereign State with any more effect than the courts of England can enforce their orders against the King. The arms of equity in America are as short against the sovereign power as they are in England against the prerogative. Mr. Justice Gray has clearly shown that a State cannot be sued in law or equity against its consent, or unless there is some general or special statute authorizing the suit. A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused."

When by the Omaha treaty the lands north of Ayoway Creek were transferred to the United States they were received in trust and the proceeds became subject to operation of the general laws governing Indian funds.

The act of January 9, 1837 (sections 2095 and 2096, Revised Statutes), provided:

> "Sec. 2095. All investments of stock, that are or may be required by treaties with the Indians, shall be made under the direction of the President; and

special accounts of the funds under such treaties shall be kept at the Treasury and statements thereof be annually laid before Congress.

"Sec. 2096. The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum."

The act of September 11, 1841 (section 3659), provided:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum."

This public policy of accounting to the Indians as to *cestuis que trust* who shall be protected against loss has been steadfastly adhered to by the United States, despite whatever lapses there may be due to ignorance, oversight or acts of subordinate officials.

Thus the act of April 1, 1880 (21 Stats., 70), provided:

"That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian Tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments;

> And the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress."

Indian appropriation act of August 15, 1894 (21 Stats., 286):

> "Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the several Indian Tribes interested therein, the face value of certain non-paying State bonds or stocks, including certain abstracted bonds described on pages one hundred and fifty-three and one hundred and fifty-four of Annual Estimates for the fiscal year ending June thirtieth, eighteen hundred and ninety-five (House executive document numbered five, Fifty-third Congress, second session), to draw interest at the rate of 5 per cent per annum, as provided by the act of April one, eighteen hundred and eighty; and thereupon said State bonds or stocks shall become the property of the United States."

Or, as expressed by this court in Minnesota *vs.* Hitchcock, 185 U. S., 396:

> "The recognized relations between the parties to this controversy, is that between a superior and an inferior, whereby the latter is placed under the care of and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice

> which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

The United States, then, having a trust relationship to the Indians and these lands in 1854, and having no lawful right to take the lands and dispose of the same to settlers with a good title except upon the condition it had concurrently paid the Omaha Tribe for the same by causing the price thereof to be placed in the United States Treasury to their credit at 5 per cent interest, was this situation and liability as of 1863 for interest altered and reversed, the United States now having at last as a sovereign nation permitted suit to be brought to determine its liability after having meanwhile enacted the act of March 3, 1863 (section 177 of the Judicial Code):

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It is submitted that the Omaha Jurisdictional Act did not contemplate that full and exact justice should be prevented by the foregoing, but that a final settlement and accounting should be made unrestricted by this general statutory provision. The reason for this statute and for the rule of non-allowance of interest by the sovereign is, as expressed in U. S. *vs.* Verdier, 164 U. S., 213-19, grounded on a public policy that the sovereign should occupy a favored position in its dealings with its individual citizens and accordingly it is held that the "equities which arise as between individuals have but a limited application as between the Government and a citizen."

But, with the reason for the rule ceasing the rule should cease. The situation is, as this court always has announced,

reversed when it comes to dealing between the United States and the dependent Indian Tribes with which it made treaties, where it stood in the position of a trustee, guardian and protector and should be astute for its own honor not to take advantage of the weak, unlearned, and helpless savages.

The situation is not even as it has been since the act of March 3, 1871 (section 2079, Revised Statutes) under which the United States undertakes to do of its own motion with Indian lands that which it deems proper:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States Government may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, *shall be hereby invalidated or impaired.*"

The case of U. S. *vs.* Sherman, 98 U. S., 565, when carefully considered, with the reasons shown by the opinion rendered to underlie the conclusions reached by the court, does not, it is submitted, sustain a contention that the United States is not liable for interest in the instant case. In the Sherman case the claimant had recovered a judgment under the Captured and Abandoned Property Acts of March 12, 1863 (12 Stats., 820), and July 2, 1864 (13 Stats., 375), against an agent of the United States. Under the acts in question express provision was made that interest against the United States should date from the time when a certificate of probable cause for the seizure by the Federal agent should be given and claimant was allowed such interest. Claimant, however, by mandamus sought to compel payment to him of interest between the date of judgment and issuance of the certificate of probable cause.

This court said:

> "Before that time (the date when the certificate was given) the Government is under no obligation,

> and the Secretary of the Treasury is not at liberty to pay, * * * Whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes. Certainly there was no delay in the present case. The Government paid the amount recovered against Callicott, viz., the sum for which the verdict and judgment were given, as soon as its liability accrued. If there has been a loss of interest, it is not due to the Government. It is due to the dilatoriness of the relator himself. * * * It would be strange, indeed, if by his own delay he can compel the United States to pay interest on a judgment which it was ready to pay as soon as its liability occurred."

In the instant case the treaty was that of the United States, the act that of the sovereign and all that followed not the failure or delay of some official. Indeed the sovereign had provided law whereby the money should be potentially at interest in the Treasury and if it be not so, in fact, it is because of neglect of an agent to carry out the ~~natural~~ National will and purpose.

This court, notwithstanding the Court of Claims statute set forth the general principle as to a nation's liability for interest, has not hesitated to allow interest.

In U. S. *vs.* McKee, 91 U. S., 422, the court affirmed the action of the Court of Claims in allowing interest on a draft given to Col. Francis Vigo by Gen. George Rogers Clarke in 1778. The matter of interest was the only really contested point on appeal. The Supreme Court, notwithstanding the act of March 3, 1863, held that the rule that the United States should not be liable for interest was not uniform. It said that the jurisdictional act in McKee's case had removed the statute of limitations and had directed the court to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases,"

and that in cases like McKee's under an act of 1790 interest had been allowed; that the draft was one which between individuals bore interest and that it saw "no reason why it should not be paid in full with all its legal incidents."

Crescent Min. Co. *vs.* Wasatch Min. Co., 151 U. S., 317, an individual case.

In this case the Wasatch Mining Co. and one Jennings were in litigation over a certain tract. The Crescent Company purchased whatever rights Jennings had, an escrow agreement being made. Later the Crescent Company purchased the rights of the Wasatch Company and an agreement was entered into in the nature of a mortgage, the former agreeing to pay $45,000 in one year absolutely if within that time the Jennings suit should be decided in favor of the Wasatch Company. If the suit should still be undetermined, the purchase money was to be paid into court. The suit continued undetermined and, the money not being paid into court, the Wasatch Company brought a foreclosure suit, claiming the amount due with interest.

The defense was, among others, that no order of court had been made for payment of the money into court and that no provision was made for interest.

Held:

> "Further objection is urged to the decree of the court below in that it called for the payment of interest on the principal sum from the time fixed for payment until the same shall have been paid into court. It is said that the mortgage does not itself provide for interest, and that if the money had been paid into court it would have there remained without interest. But this is not necessarily so. The court would, doubtless, if so requested by the parties in interest, have ordered so large a sum invested. At all events, it is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court."

Similarly, it may be noted that in the instant case the United States took the lands, to which it had no right until payment contemporaneously with acquisition of the lands involved, sold the lands, appropriated the proceeds to its own use and, it is now contended, is not liable for interest on those proceeds or any sum whatsoever, though itself obtaining interest.

The decision in Crescent Co. *vs.* Wasatch Co., *supra*, was affirmed in Spalding *vs.* Mason, 161 U. S., 275-96, as but a dictate of natural justice and the law of equity in every civilized country, the court adding:

> "The circumstance that the complainant may have considered himself entitled to an account and to receive a greater sum than was actually found to be due does not affect complainant's right to the interest upon what was really due."

When the treaty of 1854 was made, it was an agreement between one sovereignty with another dependent sovereignty, and in the case of the Republic of Colombia, 195 U. S., 24, the court held the submission of the sovereignty's case to our tribunals was a full submission, including therein the right to allow interest.

> U. S. *vs.* Old Settlers or Western Cherokees, 148 U. S., 427.

The jurisdictional act referred this claim to the Court of Claims with right of appeal to the Supreme Court, which held that as a court provided for by the Constitution it could not be made an arbitration tribunal, "it being the intention of this act to allow the Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, *legal and equitable, both* of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in such cause and render final judgment thereon."

The court held the foregoing conferred equity jurisdiction

and that the "unrestricted latitude" was that of courts of equity under principles of equity, found a sum due and held that notwithstanding the statute as to non-allowance of interest there should be interest allowed.

In United States *vs.* State of New York, 160 U. S., 598, the Court of Claims, on the ground that it was prohibited by the statute creating it from allowing interest prior to judgment by it and also "on the general rule based on grounds of public convenience that interest is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers," disallowed a claim of the State of New York for $91,320.84, representing the amount the State had paid to a State canal fund as interest on moneys borrowed from the canal fund for the purpose of raising troops for defense of the Union in the Civil War. This court reversed the court below and allowed the claim on the ground that, liberally interpreted, the acts of Congress passed "to indemnify the States for expenses incurred by them in defense of the United States" created an obligation to indemnify the States for any costs, charges and expenses properly incurred for the purposes expressed in the act and that interest paid to its own canal fund was such a cost or expenses as much as moneys directly within the provisions of the act.

The Non-Allowance of Interest on the Item of $18,202.19.

Interest on this item, covered by findings 4 and 7 (pp. 17-18), was first allowed and then the action rescinded. It seems to need no argument that allowance of the amount stated was proper. What has been heretofore set forth as to interest is here reiterated.

FINDING 5, FAILURE TO AFFORD THE OMAHAS THE PROTECTION GUARANTEED BY ARTICLE 7 OF THE TREATY OF 1854 AND CONSEQUENT INJURY.

The Omaha Tribe have been found by the Court of Claims (p. 17) to have been guaranteed protection against the Sioux and other hostile tribes by article 7 of the treaty of 1854. The court has found repeated attacks were made shortly after the Omahas had established themselves in their new, fixed, reservation home; that they called for protection as provided by the treaty, were furnished none, that protection was necessary, and not being afforded some 22 Omahas were killed and 152 horses stolen by the Sioux marauders. This plainly was a breach of the express treaty provisions and would seem on all legal principles to call for legal redress.

The Court of Claims has allowed a very moderate recovery for horses only. It has found nothing as to the wounded, of whom the record shows more than forty, and disposes of the claim of the tribe for damages for deaths of its members by saying merely it does not appear "what price one tribe should pay to another for killing a member of the tribe" (p. 17).

The court apparently disposed of this phase of the case on the theory it was against the Sioux Tribe. The claim, however, was one against the United States for breach of a contract of guaranty. The breach being admitted some damages should have been awarded. The court below apparently thought it could fix a value on horses, but not on the life of an Indian. The fact that the killed were tribal members, however, no more absolves the court from using its best judgment with the light before it than is a court in any personal injury case. It had before it the following evidence as respects the United States, taken from the Annual Report of its Commissioner of Indian Affairs for 1842, page 65:

> "I am happy to report that both Otoes and Missourias have cheerfully assented to the regulation of *the Department 'for preventing* depredations among the Indian tribes,' provided the neighboring tribes shall place themselves under a like obligation; and they have recently entered into an agreement with the Delawares whereby they have mutually bound themselves to pay a forfeiture of $1,000 for any murder committed by the Indians of either tribe on those of the other.
>
> "I have not yet had an opportunity of submitting the regulation above referred to to the Omahas and Pawnees; I, however, anticipate no opposition from either tribe to its adoption."

The Omahas just before the treaty was made had been compelled by a Sioux incursion to make their home near Bellevue in the southern part of their reservation, to keep together, and to use the balance of their lands for hunting, keeping a sharp lookout for the Sioux, and banding together with the Pawnees if danger were to be apprehended. They absolutely refused, despite pressure continued over nearly two years, to establish a permanent reservation and keep on it steadily, north of Ayoway Creek, and thus invite Sioux attacks. They yielded reluctantly to becoming reservation Indians south of Ayoway Creek, knowing well it was part of Sioux Indian policy to attack any Indians who became treaty reservation Indians, and that the Sioux would redouble their attacks once they learned what the Omahas had done. The consideration offered by the United States was "protection," and this agreement was broken.

Had there been some show of protection or had it been afforded for a time and then discontinued it might be argued that the President was clothed with a discretion and exercised it; that he considered protection no longer necessary. But the attacks began immediately after the Omahas removed and continued and no protection ever was given. The words of the treaty meant something. To hold that the phrase "so

long as the President deems necessary" requires a presumption the President acted and deemed protection never necessary is to render the article meaningless and valueless to the Indians.

As to the value to the tribe of loss of life or injury of its members, the fact there is no rule of thumb measure of such damages places more responsibility on and gives the court a wider range of action, but does not relieve it of the duty of declaring damages. It was shown that the Indians at this time lived a communal life. Each tribal member was a tribal asset, in hunting the common food, in protection against hostile Indians, and in continued preservation of tribal title to the lands since Indian ownership depended on tribal existence and occupancy.

It is submitted that the amount asked of $1,000 per member is moderate and should have been allowed by the court below and by this court.

Finding 8, Reimbursement for Worthless, Dying Cattle Never Issued.

This item of the Court of Claims, while below the proper amount, was allowable and should remain. It is strictly in accord with the ruling in Chickasaw Nation *vs.* The United States, 22 Court of Claims, 250-251.

Finding 9, Reimbursement for Cost of an Infirmary.

This infirmary, which, as Indian Inspector Pollock once reported, was a worthless, never-used structure that stood as a "monument to error" was an instance, as found, of misuse of Indian funds in violation of treaty provisions. The United States, it is submitted, are legally and equitably liable for the loss.

Claimants Have Moved the Whole Record Should be Certified and Reviewed.

Counsel know the reluctance of this court to be burdened with an entire record instead of merely findings of fact from the Court of Claims. They believe, however, as hereinbefor outlined, that on the whole record the Omaha Tribe would be found entitled to a much larger recovery than awarded by the Court of Claims, and that it is a case in equity, where the rule as to certification of findings of fact merely does not obtain.

The suit is one for an accounting, involving a number of complex matters of account and as such would be cognizable in equity ordinarily.

The jurisdictional act in terms conferred equity jurisdiction.

The suit, among other matters, involves trust relationships.

In equity and in an equitable accounting the rights of petitioner are greater than in a proceeding strictly at law and the jurisdictional act so recognized.

In the case of The United States *vs.* Old Settlers, 148 U. S., 427, it was held that where the jurisdictional act provided: "it being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined," it was evident equity jurisdiction had been conferred and equitable principles should apply, and that in such a case the full record on appeal, including testimony taken, should be transmitted and not merely findings of fact.

The full record will disclose the lack of basis for assertion that the Ponca Tribe prior to or in 1854 had rights south of the Missouri and Niobrara rivers. It will show conclusively the Omahas had lawful claim by Indian title and by official

recognition to all land south of the Missouri and the Niobrara rivers, and should be paid for some hundreds of thousands acres more than 473,000 acres, and that counsel for claimant erred at the outset in claiming only 500,000 acres by following incorrect reports, made to Congress by the Indian Office. The Omaha ownership is established by official and authentic maps, by official reports and documents, State histories, and oral evidence that speaks its verity and accuracy.

Respectfully submitted,

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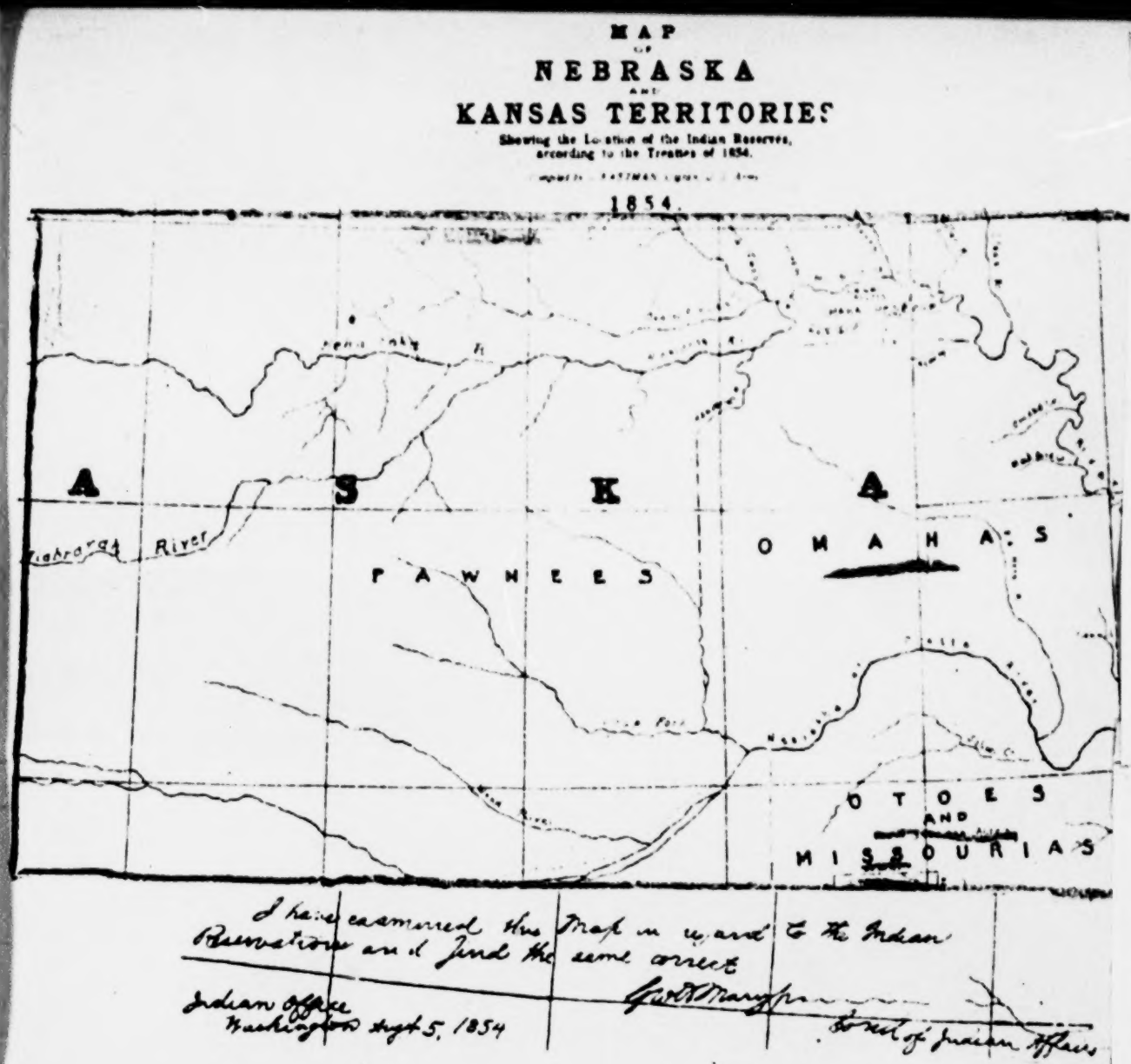
Attorneys for the Omaha Tribe of Indians.



Note: The words in the northern or top of this map immediately beneath the words "Mi river" are "Omaha Reserve", and the dotted lir the "Ayoway Creek" line but places the "Niobr

UNITED STATES v. OMAHA TRIBE OF INDIANS.

OMAHA TRIBE OF INDIANS v. UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 243, 244. Argued March 18, 1920.—Decided June 1, 1920.

Findings purely of fact or of mixed fact and law are not reviewable on appeal from the Court of Claims. Pp. 280, 281.

By the Treaty of March 16, 1854, Art. 7, 10 Stat. 1043, the United States agreed to protect the Omahas from the Sioux and other hostile tribes as long as the President might deem such protection necessary. In a suit under the jurisdictional Act of June 22, 1910, c. 313, 36 Stat. 580, *held*, that failure to provide necessary protection did not render the United States liable to pay for horses stolen and Omahas killed by the Sioux, in the absence of a finding that the protection was deemed by the President to be necessary. Pp. 280, 283.

The agreement of the United States, in the Treaty of March 6, 1865, 14 Stat. 667, to pay a certain sum to the Omahas to be expended for cattle, etc., for their benefit, was not complied with by supplying cattle which died after reaching the reservation as a result of bad condition when purchased or of bad treatment while being driven there from market; and a finding that such cattle "when they reached the reservation were in bad condition and 50 of them died," necessarily imports that death was due to one or the other of those causes rather than to the hardships of the drive. Pp. 279, 280.

Under the treaties of 1854, *supra*, Art. 4, and of 1865, *supra*, Art. 2, certain moneys of the Omahas were to be or might be expended by the United States in the way of improvements for their benefit, Art. 4 authorizing the President to expend part "for such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes." *Held:* (1) That a finding that a building, constructed as an infirmary, "was not used, and it was not such a building as was contemplated by the treaties," should be interpreted as meaning that it was not suitable for its purpose and was not accepted by the Indians; (2) that the Indians were not obliged to accept it, and the expenditure was a misappropriation of their funds "for purposes not for their material benefit," within the jurisdictional Act of June 22, 1910, *supra*. Pp. 279, 281.

By the Treaty of 1854, *supra*, the land of the Omahas south of a certain line was ceded for a fixed consideration to be paid in the future either in money or through expenditures for their use from time to time at the President's discretion, and it was provided that, upon a certain contingency (which took place), their land north of the line "shall be and is hereby ceded" at the same rate per acre as paid for the land south, deducting the area of a new reservation to be assigned. *Held*, that in the second case, as in the first, the passing of title was not conditioned upon payment of the consideration, and that interest upon the amount to be paid was not allowable. Jud. Code, § 177. P. 281.

The fact that the jurisdictional Act of June 22, 1910, *supra*, authorized the determination of all equitable as well as legal claims of the tribe did not take the case out of the rule denying interest on claims against the Government. P. 283. *United States* v. *Old Settlers*, 148 U. S. 427, distinguished.

53 Ct. Clms. 549, reversed in part; affirmed in part.

THE case is stated in the opinion.

Mr. Assistant Attorney General Davis, with whom *Mr. Geo. T. Stormont* was on the brief, for the United States.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler* and *Mr. Hiram Chase* were on the brief, for the Omaha Tribe of Indians.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here an appeal and a cross-appeal from a judgment of the Court of Claims in a suit brought under the Act of June 22, 1910, c. 313, 36 Stat. 580, which conferred upon that court jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha tribe of Indians may have or claim to have against the United States . . . under the treaty between the United States and the said tribe of Indians, ratified and affirmed March sixteenth, eighteen hundred and fifty-four, or under

any other treaties or laws, or for the misappropriation of any funds of said tribe for purposes not for its material benefit, or for failure of the United States to pay said tribe any money due"; with authority to hear and determine all legal and equitable claims of the tribe, and also any legal or equitable defense, set-off, or counterclaim, and to settle the rights both legal and equitable of the parties, notwithstanding lapse of time or statutes of limitation.

The Court of Claims, after hearing the case, made findings upon which it awarded judgment in favor of the Indians for various sums aggregating $122,295.31. 53 Ct. Clms. 549.

By Article 1 of the Treaty of March 16, 1854 (10 Stat. 1043), the Omaha Indians ceded to the United States all their lands west of the Missouri River and south of a line drawn due west from a point stated, reserving the country north of that line for their future home, with a proviso that if this country should not, on exploration, prove to be a satisfactory and suitable location for the Indians the President might with their consent set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them, not greater in extent than 300,000 acres, in which case all of the country belonging to said Indians north of the line specified should be ceded to the United States, and the Indians should receive the same rate per acre for it, less the number of acres assigned in lieu of it, as was agreed to be paid for the lands south of the line. By Article 4, in consideration of and payment for the country thus ceded, and certain relinquishments made by the Indians, the United States agreed to pay to them certain sums of money aggregating $840,000, in specified annual installments commencing on January 1, 1855; these sums to be paid to the Omahas or expended for their use and benefit under the direction of the President of the United States, who was from time to time to determine at his discretion what proportion of the annual payments should be paid in money and what proportion

applied to and expended for the moral improvement and education of the Indians; for such beneficial objects as in his judgment would be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, etc.; and for medical purposes. By Article 5, in order to enable the Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and for certain other expenses, they were to receive from the United States the further sum of $41,000, to be paid out and expended under the direction of the President and in such manner as he should approve.

The Court of Claims found that the Omahas were not satisfied with the country to the north of the east-and-west line mentioned, and duly elected to take for their future home a tract of 300,000 acres south of the line; and this fact being reported to the President, by his direction a tract of 300,000 acres south of the line was set apart for them. The court found that the area of the land north of the line belonging to the Indians was 783,365 acres, and that after deducting from this the 300,000 acres set apart for them in accordance with the provisions of the treaty there was an excess of 483,365 acres, for which they had not been paid. The price for this was fixed by taking the aggregate of the treaty payments ($881,000) and dividing it by 4,500,000 acres, the area of the lands south of the line ceded by the Omahas to the United States, making the treaty price 19.6 cents per acre, at which rate the 483,365 acres for which the Indians were still to be paid amounted to $94,739.54. This was awarded to them.

The court found that of the $41,000 specified in Article 5, the Government expended $23,453.21 in carrying out the provisions of that article, and the balance, $17,546.79, remained in the hands of the Indian agents of the United States charged with the disbursement of the treaty funds, who were guilty of defalcations of this and other moneys to the aggregate amount of $18,202.19. This was allowed.

By the 7th Article of the treaty the United States agreed to protect the Omahas from the Sioux and all other hostile tribes as long as the President might deem such protection necessary. The court found that after the treaty the Sioux made repeated attacks upon the Omahas in the year of removal and subsequent years; that the United States was called upon by the Omahas to protect them, and such protection was necessary as soon as they removed to their new home and for several years thereafter, but no protection was afforded them by the United States. The Sioux killed 22 Omahas and stole 152 horses, the latter worth $30 per head. The court allowed $4,560 for the horses, but made no allowance for the Indians killed.

By a treaty concluded March 6, 1865 (14 Stat. 667), the United States agreed to pay the Omahas for the cession of a part of their reservation the sum of $50,000, to be expended "for goods, provisions, cattle, horses," etc., for their benefit. Pursuant to this, as the Court of Claims found, 103 head of stock cattle were delivered in the year 1867 for which $3,432.99 was paid out of money belonging to the Omahas. "These cattle when they reached the reservation were in bad condition and 50 of them died," of an average value of $33.33 per head, the 50 being worth $1,666.50. This sum was allowed.

Under Article 4 of the Treaty of 1854 and Article 2 of the Treaty of 1865 certain moneys were to be or might be expended for the benefit of the Indians in the way of improvements upon their reservation, and in other ways. Under these provisions, in the year 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. The Court of Claims found that this building was not used, and was not such a building as was contemplated by the treaties with the Omahas; and that of its cost, $3,127.08 was paid out of money belonging to them. This sum was allowed.

The principal reason for the Government's appeal lay in

the award to the tribe of $94,739.54 for the excess land north of the dividing line mentioned in the treaty; it having been contended in the court below that the tribe owned none of that land. The Court of Claims having found to the contrary, the Government moved this court, after taking appeal, for an order remanding the case with directions for further findings on the question. This motion having been overruled, as well as a counter motion submitted by the claimant for a certification of the entire record to this court, the Government concedes that it cannot contest the correctness of the judgment upon this item.

As to the item of $4,560 allowed as the value of horses killed by the Sioux Indians, we conclude that the objection of the Government is well founded. The obligation of the treaty was to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." The obligation depended upon an exercise of discretion by the President. There is no finding of a failure to provide any protection deemed by the President to be necessary; hence nothing to create a liability, legal or equitable, under the treaty clause.

The item of $18,202.19 allowed for defalcations of the Indian agents is not disputed.

The Government contests the allowance for the stock cattle upon the ground that the fact that they were in bad condition when they reached the reservation is not sufficient to show that they were in such condition when purchased; it being suggested that their defective condition upon reaching the reservation may have been due to the rigors and hardships of the drive from the market to the reservation. We cannot so interpret the finding; deeming its necessary import to be that the cattle either were in bad condition when purchased or were badly cared for on the way to the reservation. In either event the fault lay with the agents of the United States, and the Indians were entitled to credit for the sum allowed on this account.

The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of Article 4 of the Treaty of 1854 authorizing the President to expend a part of the fund "for such beneficial objects as in his judgment will be calculated to advance them in civilization" and "for medical purposes." We construe the finding, "This building was not used, and it was not such a building as was contemplated by the treaties," as meaning not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseparable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable. *Ross* v. *Day*, 232 U. S. 110, 116–117, and cases cited. The fact that the building was not used shows that the tribe did not accept it, and received no benefit from it. And since, because of its unfitness, they were not obliged to accept it, the expenditure of their money in its construction was a misappropriation of funds of the tribe "for purposes not for its material benefit," within the meaning of the jurisdictional act. We affirm the allowance of this item.

Upon the cross-appeal, assignments of error are based upon the disallowance of interest. As to the $94,739.54 awarded for the land north of the dividing line in excess of 300,000 acres, it is contended that payment of this consideration was a concurrent condition of the passing of title to the United States, and as equity considers that as done which ought to be done the purchase money was, potentially, in the Treasury of the United States as a trust fund, and ought to be treated as if invested for the benefit of the Indians at 5 per cent. interest, under Rev. Stats.,

§§ 2095, 2096 and 3659; or, in the alternative, that the assumption by the United States of title to the land without compliance with the concurrent condition of payment to the Indians and its sale by the United States to settlers was a breach of trust requiring the United States to account to the Omahas for the minimum sale price of $1.25 per acre. But the provisions of Articles 1 and 4 of the treaty show that the theory that the passing of title was conditioned upon the payment of the consideration money, or any part of it, is untenable; hence there was no such trust as is asserted; and the price of the land was fixed by the treaty itself. By Article 1 there was a cession *in præsenti* of the land south of the described line, with a proviso that if upon exploration the country north of the line did not prove to be a satisfactory and suitable location for the Indians the President might, with their consent, set apart and assign to them a suitable residence, in which case all of the country belonging to them north of the line "shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line." By Article 4 the consideration money for the principal cession was to be paid in the future, and either paid to the Indians direct or expended for their use and benefit from time to time, in the discretion of the President; and, by fair construction, the money that the Indians were to receive under Article 1 for the additional cession of the land north of the line, in the event of such cession taking effect, was subject to the same terms as to payment, at least to the extent that it was for the President to determine in his discretion whether it should be paid in cash to the Omahas or expended for their benefit "from time to time." Clearly, an intent to defer passing of title until payment of consideration is negatived; and this as truly with respect to the land north of the line as to that south of it. In both cases there was

simply a present cession, with a covenant for payment of the consideration thereafter, no mention being made of interest. Clearly, the provision of § 177, Judicial Code, is applicable: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

It is contended, however, both as to the award for the excess land and as to another claim allowed, that as the jurisdictional act calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest (*Himely* v. *Rose*, 5 Cranch, 313, 319, being cited). But the jurisdictional act cannot be regarded as taking the case out of the usual rule. *Tillson* v. *United States*, 100 U. S. 43, 46; *Harvey* v. *United States*, 113 U. S. 243, 249. Nor does *United States* v. *Old Settlers*, 148 U. S. 427, support the claim for interest; for there the particular question was a subject of difference in the negotiation that preceded the treaty; a clause of the treaty itself provided that it should be submitted to the Senate of the United States for decision; the Senate allowed interest; and its determination was accepted by the United States as valid and binding. This court held that the decision of the Senate was controlling, and that therefore interest must be allowed upon that part of the claim to which it applied. See 148 U. S. 433, 449, 451, 452, 478.

The contention of claimant that the Court of Claims erred in not making a pecuniary award for the members of the Omaha tribe killed by the Sioux is covered by what we have said to show that there was error in making an allowance for the horses stolen by the Sioux; the same treaty provision governing both claims.

Other assignments are based upon the failure of the court to find certain facts in accordance with claimant's contention. These require no discussion, since our review is based upon the findings as made.

The judgment will be reversed as to the sum of $4,560 awarded for horses killed by the Sioux Indians, and in other respects affirmed.

Reversed in part; affirmed in part.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.